TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 362.

THE MADISONVILLE TRACTION COMPANY, APPELLANT,

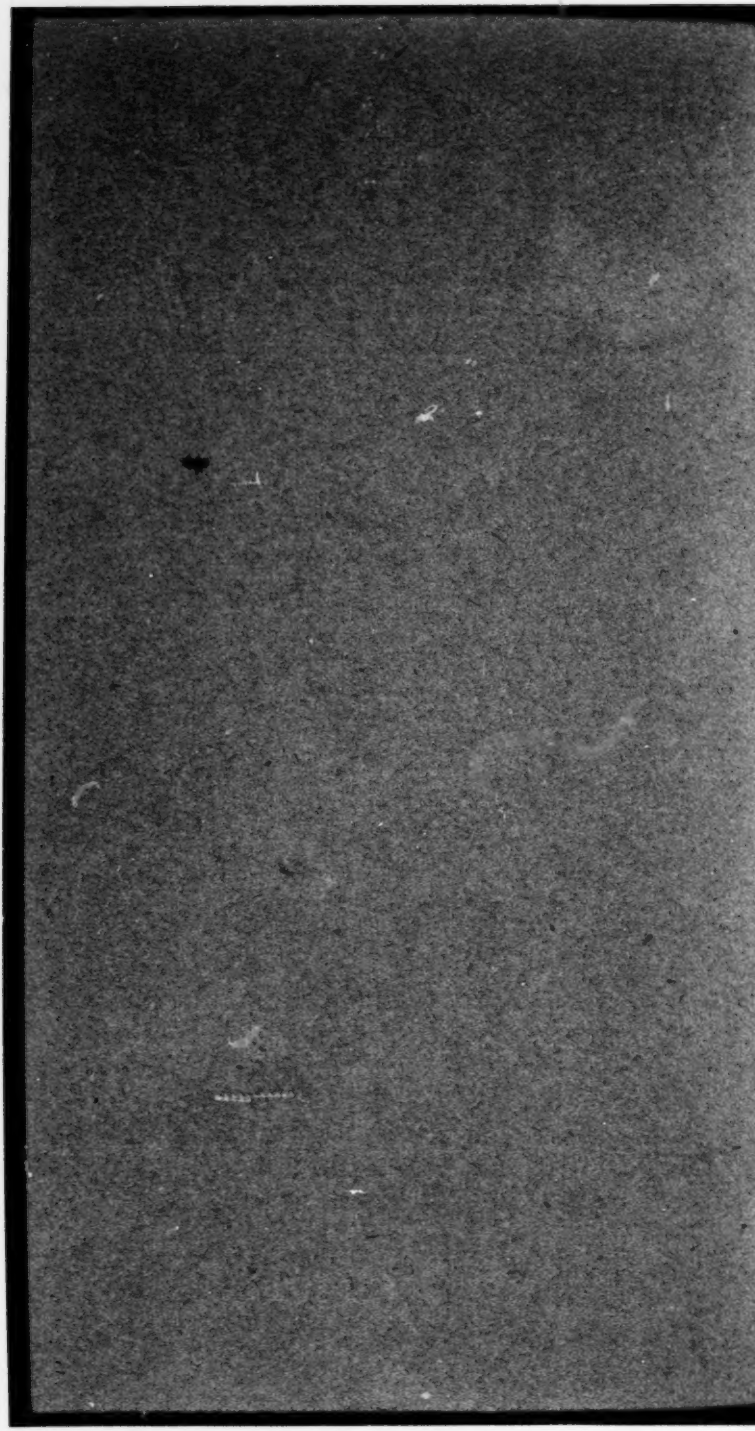
vs.

THE SAINT BERNARD MINING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED SEPTEMBER 1, 1904.

(19,462.)



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1 Proceedings of the circuit court of the United States for the western district of Kentucky, at a regular term begun and held for its May term, at the Federal Court hall, in the city of Owensboro, Monday, May 2, 1904.

Present: Honorable Walter Evans, sitting as circuit judge.

SAINT BERNARD MINING COMPANY
vs.
MADISONVILLE TRACTION COMPANY.

Be it remembered, that heretofore to wit on the 2nd day of January, 1904, came the above named complainant herein by E. G. Sebree its attorney, and filed in the clerk's office of our said court its bill of complaint, against the above named defendant, which said bill of complaint is as follows:—

2 In the Circuit Court of the United States in and for the Western District of Kentucky, Owensboro Division.

THE SAINT BERNARD MINING COMPANY, Plaintiff,
vs.
THE MADISONVILLE TRACTION COMPANY, Defendant.

Bill in Equity.

To the honorable the judges of the circuit court of the United States for the western district of Kentucky:

The Saint Bernard Mining Company a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, and now a citizen and resident of said State, brings this its bill in equity against the Madisonville Traction Company, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Kentucky and now a citizen and resident of said Commonwealth,

And thereupon your orator complains and says:—

I.

That heretofore to wit on October 5th, A. D., 1903, the said defendant The Madisonville Traction Company began an action or proceeding against this plaintiff The Saint Bernard Mining Company in the county court in and for Hopkins county, Kentucky, in the name or style of The Madisonville Traction Company, plaintiff against The Saint Bernard Mining Company, defendant, the said plaintiff in said action or proceeding The Madisonville Traction

Company then filing in said court a writing entitled and purporting to be "A particular description of land to be condemned by the Madisonville Traction Company, the same being owned by and the property of the Saint Bernard Mining Company, this day filed in the office of the clerk of the county court for Hopkins county," and also at the same time an "Application to the county court to appoint commissioners to assess damages to the lands of the Saint Bernard Mining Company," from which writings or pleadings so filed it appears and is claimed that the plaintiff The Madisonville Traction Company is a corporation created and existing under and by virtue of the laws of the Commonwealth of Kentucky,
3 and that by virtue of its corporate capacity it is empowered and authorized to construct and maintain a railroad running from Madisonville to Earlington, Hopkins county, Kentucky, and that it — unable to contract with the defendant Saint Bernard Mining Company, the plaintiff in this action, the said company being the owner of land alleged to be necessary for its use as a right of way for the purpose of laying its tracks over and upon which it is necessary to operate its said line of railroad and that the said land necessary for its use for the purpose of right of way is embraced in a strip of ground thirty and fifty feet wide, a particular description of which is alleged in said application to have been filed in the office of the clerk of the county court and to which reference is made in said application and which is asked to be made a part of said application, the said alleged particular description being marked as herein before set out. Said application does further allege that by reason of the fact that the Madisonville Traction Company is unable to contract with the defendant Saint Bernard Mining Company, here plaintiff for land necessary for the use of the Madisonville Traction Company, as a right of way, therefore said land will have to be condemned in order that the said Madisonville Traction Company may enjoy its rights and privileges, as are alleged to be guaranteed to it under the law, and the said application concludes by praying the said court to appoint three commissioners for the purpose of viewing the ground over and upon which said alleged road is proposed to run and to award the Saint Bernard Mining Company, such damages as it must sustain by reason thereof and to report their action in writing to the court. That thereafter on October 16th, 1903, the alleged commissioners appointed by the said Hopkins county court, in response to the aforesaid application, to view the lands therein mentioned and to assess the damages, that the Saint Bernard Mining Company must sustain by reason of the construction of the railroad of the Madisonville Traction Company, filed a written report in the Hopkins county court, in which they state that they have been upon the land of the defendant, describing same substantially in the same way as in the original "particular description" herein above referred to and that they award the Saint Bernard Mining Company $100.00 as damages for the taking of said land and upon filing

of the said report, this plaintiff was summoned by process
4 showed on the application aforesaid and the report of the commissioners aforesaid, to answer in the said Hopkins county court on the second day of November, 1903, that on said date this plaintiff came in the Hopkins county court and filed and exhibited in said court its petition and bond for removal of the said action of The Madisonville Traction Company, plaintiff *vs.* The Saint Bernard Mining Company, defendant, then pending in the said Hopkins county court, into this court and by said petition, did truthfully show to the Hopkins county court that the said action was of a civil nature and that the sum in dispute in said action exceeded the sum of $2000.00 exclusive of interest and costs, and showed that The Saint Bernard Mining Company defendant to said action, was and *tjay* it was at the time of the commencement of the said action and has bee- continuously since December 1901, a corporation, created, organized and existing under and by virtue of the general corporation laws of the State of Delaware, having and maintaining its residence and chief office in the city of Dover, county of Kent, in the said State and that it was a citizen and resident of the State of Delaware and was not a citizen or resident of Kentucky and showed that the plaintiff The Madisonville Traction Company alleged that it was and so far as the Saint Bernard Mining Company was then advised it believed, that the said Madisonville Traction Company was a corporation, duly organized and existing under and by virtue of the laws of the Commonwealth and was a citizen and resident of Kentucky and was not a citizen or resident of the State of Delaware.

That the said petition also showed that the Saint Bernard Mining Company disputed said claim and application and denied any right of the applicant, The Madisonville Traction Company to condemn its land and denied each and every allegation of said application and showed that the said application was deficient and insufficient, both in form and substance, and was not based upon facts and was not brought in good faith; that the said petition was duly subscribed and sworn to according to law by John B. Atkinson president and chief officer of the Saint Bernard Mining Company. That at the same time the Saint Bernard Mining Company presented and tendered a good and sufficient bond, as provided by the statutes in such cases, that the said company on or before the first day of the next
5 ensuing session of the United States circuit court for the western district of Kentucky, Owensboro division, would file therein a transcript of the record in the -aid action and for the payment of all costs which might be adjudged by such court if the said circuit court should hold that the suit was wrongfully or improperly removed thereto. Plaintiff states that it did thereupon move the said Hopkins county court to remove the said action into this honorable court and to stop proceedings of said action in said Hopkins county court, and to approve the said bond, tendered by the Saint Bernard Mining Company, to which motion, the defendant, Madison-

ville Traction Company, objected and the court having considered said motion, it did overrule same and it did refuse to remove the said action into this court and refuse to stop proceedings in the Hopkins county court, in said action, but said Hopkins county court did approve the bond tendered and filed by the Saint Bernard Mining Company. That thereafter to wit on the first day of the regular November term A. D., 1903 in this the honorable circuit court of the United States for the western district of Kentucky, Owensboro division, this plaintiff did bring exhibit and file in this honorable court, then sitting at Owensboro, Kentucky, a duly certified and complete copy and transcript of The Madisonville Traction Company plaintiff, *vs.* The Saint Bernard Mining Company, defendant, in the Hopkins county court. The record in said action or proceeding is on file in the clerk's office of this honorable court, and is hereby expressly referred to and shall be read as part hereof but is not to be copied.

II.

And thereupon your orator complains and says: That disregarding the laws and statutes in this behalf made and provided the said Hopkins county court, acting always at the instance of the defendant, Madisonville Traction Company, and said Madisonville Traction Company since the said record was filed in this honorable court, as aforesaid, is compelling this plaintiff, over its *product*, to proceed, in the said court and will proceed to try and to determine the matters in controversy in said original action or proceeding in the said Hopkins county court, and is about to, and will unless restrained by this honorable court, confirm the said report of the commissioners and take from this plaintiff its said land and allow the said Madisonville Traction Company to enter upon, take possession of
6 and confiscate certain of the lands of the Saint Bernard Mining Company particularly described in the aforesaid writing entitled "Particular description" notwithstanding the removal by operation of law of said action into this court, in which court the said action is now pending, and in disregard of the law and statute in such case made and provided and in contempt of this honorable court.

Plaintiff states that it has a good and valid defence to the said action, and that it disputes said claim and application and denies any right of the Madisonville Traction Company to condemn its lands, and denies each and every allegation of said application and says that the said application is deficient and insufficient both in form and substance and is not based upon facts and is not brought in good faith. That the said report of the commissioners is insufficient in law, and in form, and in substance, and that the alleged commissioners acted improperly, unfairly and unfaithfully in the viewing of its land and in the preparation of their report and in the awarding of damages; that $100.00 is wholly inadequate as compensatio- and appears to have been and was assessed and given under

the influence *and* passion and prejudice or some other illegal motive and that the said land sought to be taken, intrinsically, is worth a great deal more than said amount, and that the incidental damages done to property of plaintiff in the construction of the said road, which damages under the laws of Kentucky, the said commissioners should have taken into consideration and assessed, amount to over $2000.00 and without any consideration or being taken into consideration by the commissioners at all said alleged commissioners in their report, assume to say and report " that the advantages and benefits that will accrue to the adjoining lands through the construction — prudent *and* operation of the railroad proposed to be constructed, will be largely in excess of any damages that will accrue, that in fact they did not believe that any damages will result therefrom." Which statement and allegation is untrue, as plaintiff is prepared to show. Plaintiff says that the damages to its property and business will not be benefitted in the least degree by the construction or prudent operation of said railroad and that it is proposed to deprive it of over 9 acres of its land, which through its location is valued at and is worth over $2500.00 and is so situated that such deprivation will irreparably injure and damage its
7 remaining land. In consideration whereof, and insomuch as your orator is remediless in the premises at and by the strict rules of the common law and is only relievable in a court of equity, where matters of this kind are properly cognizable, and reviewable in so much as said action is being prosecuted in the said Hopkins county court, by the said The Madisonville Traction Company, notwithstanding the removal of the said action by operation of law into this honorable court, and is about to an- will unless restrained by this honorable court, result in serious and irreparable harm and damage to this plaintiff and for which this plaintiff can-ot be adequately compensated at law. To the end therefore that your orator may have that relief which he can only obtain in a court of equity and that this honorable court may protect its jurisdiction and that the said defendant may answer the premises but not upon oath or affirmation to believe whereof the benefit is waived by your orator, does now pray this honorable court that the Madisonville Traction Company be restrained and enjoined from further prosecution of or causing to be prosecuted the action of The Madisonville Traction Company plaintiff *vs.* The Saint Bernard Mining Company defendant, in the Hopkins county court, of Kentucky, and that it be enjoined and restrained from taking any steps or orders, or making any motions and from appearing in the said Hopkins county court in any way in the said action and from taking any proceeding whatever, in the said court in said action and your orator prays that upon hearing, an injunction be granted of the same tenor enjoining and restraining the said defendant from the doing of any such acts and prays for any further relief to which it may appear entitled.

E. G. SEBREE,
Att'y for Pl'ff.

United States District Court for the Western District of Kentucky.

THE SAINT BERNARD MINING COMPANY, Plaintiff,
—
THE MADISONVILLE TRACTION COMPANY, Defendant. } Affidavit.

Affiant, E. G. Sebree ststaes that J. B. Atkinson, the president of the St. Bernard Mining Company is absent from the county of Jefferson and that he the said Sebree is the chief officer of said plaintiff, now in Jefferson county, and he says that the statements made in the foregoing bill are true to the best of his knowledge and belief.

E. G. SEBREE.

Subscribed and sworn to before me this the 6th day of January, A. D., 1904.

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

8 The transcript of the record in the case of Madisonville Traction Co., plaintiff *vs.* St. Bernard Mining Co. defendant, in the Hopkins county court, mentioned in the bill of complaint, is as follows:

In the Hopkins County Court in and for Hopkins County, Kentucky.

MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
THE SAINT BERNARD MINING COMPANY, Defendant. }

Petition and Bond for Removal Herein.

To the honorable county court in and for Hopkins county, in the Commonwealth of Kentucky:

The petition of The Saint Bernard Mining Company defendant in the above styled cause respectfully shows to this honorable court,

That your petitioner is the defendant in the above styled action and that said action has been commenced against it in your said court by the plaintiff Madisonville Traction Company and that said action is of a civil nature.

That on October 5th, 1903, the said plaintiff came and filed in your said court a writing entitled and purporting to be "A particular description of land to be condemned by the Madisonville Traction Company the same being owned by and the property of the Saint Bernard Coal Mining Company, this day filed in the office of the clerk of the county court for Hopkins county," and also at the same

time an "Application to the county court to appoint commissioners to assess damages to the lands of the St. Bernard Mining Company" in which application it is claimed that the plaintiff Madisonville Traction Company is a corporation created, and existing under and by virtue of the laws of the Commonwealth of Kentucky and that by virtue of its alleged corporate capacity it is empowered and authorized to construct and maintain a railroad running from Madisonville to Earlington, Hopkins county, Kentucky, and that it is unable to contract with the defendant St. Bernard Mining Company, the owner of land alleged to be necessary for its use as a right of way for the purpose of laying its tracks, over and upon which it is necessary to operate its said line of railroad, and that the said land necessary for its use for the purpose of
9 right of way is embraced in a strip of ground thirty and fifty feet wide of a particular description of which is filed in the office of the clerk of the county court, to which reference is made and asked to be made a part of said application, the same being marked as aforesaid. Said application does further allege that by reason of the fact that it is unable to contract with the defendant St. Bernard Mining Company for land necessary for its use as a right of way, therefore same will have to be condemned in order that it may enjoy its rights and privileges as are alleged to be guaranteed to it under the law, and said application concludes by praying this court to appoint three commissioners for the purpose of viewing the ground over and upon which said alleged road is proposed to run, and award defendant such damages as it must sustain by reason thereof and to report their action in writing to the court.

That your petition- disputes said claim and application, and denies any right of the applicant or plaintiff to condemn its lands, and denies each and every allegation of said application, and says that said application is deficient and insufficient both in form and substance and is not based upon facts and is not brought in good faith.

That thereafter on October 16, 1903, the alleged commissioners appointed by the court in response of the aforesaid application to view said land and to assess the damages the St. Bernard Mining Company may be entitled to receive by reason of the land being sought to be condemned filed a written report in this honorable court in which they state that they have been upon the land of the defendant, describing same substantially in the same way as in the original "A particular description, etc." hereinbefore referred to and award the defendant $100.00 as damages for the taking of said land.

Defendant shows to the court that the said report is insufficient in law in form and in substance, and that the alleged commissioners acted improperly and unfaithfully in -he viewing of said lan- and in the preparation of their report, and that the award of damages is grossly inadequate, and appears to have been assessed and given under the influence of passion and prejudice, or some other ille-
10 gal motive, and that the said land is intrinsically worth a great deal more than said amount and that the incidental damages

to its property from the construction of said road which under the law the said commissioners should have taken into consideration and assessed, amount to over two thousand dollars and were not considered or taken into consideration by the commissioners at all. Said alleged commissioners in their sa-d report assume to say and report " that the advantages and benefits that will accrue to the adjacent lands from the construction and prudent operation of the railroad proposed to be constructed will be largely in excess of any damages that will accrue and in fact, they do not believe any damage will result whatever," which statement and allegation is untrue, as the petitioner will in due time show.

Petitioner says that the damage to its propertt and business from the construction and prudent operation of said proposed railroad, will be greatly in excess of two thousand dollars, and that its property and business will not be benefitted in the least degree by the construction or prudent operation of said railroad, and that it is proposed to deprive it of over nine acres of its land, which from its location is valued at over two thousand dollars and is so situated that such deprivation will irreparably injure and damage its remaining lands.

That the matter in dispute in this action exceeds the sum of two thousand dollars, exclusive of interest and costs.

That the defendant The Saint Bernard Mining Company is and at the time of the commencement of the proceeding herein was as its has been continuously since December 1901 a corporation created, organized and existing under and by virtue of the general corporation laws of the State of Delaware, having and maintaining its residence and chief office in the city of Dover county of Kent in staid State, and that it is a citizen of the State of Delaware and is not a citizen of Kentucky.

That the plaintiff The Madisonville Traction Company alleges that it is, and so far as defendant is now advised, it believes that it is a corporation duly organized, and existing under and by virtue of the general corporation laws of the Commonwealth of Kentucky, and is a citizen of Kentucky and is not a citizen or resident of the State of Delaware.

11 Petitioner would further show that it has been summoned by process issued on the application aforesaid and the report of the commissioners aforesaid, to answer herein on the second day of November, A. D., 1903, and that it has until said day to plead or answer and show cause herein and it now comes on said day and brings this its petition.

Wherefore, the premises being considered your petitioner presents a good and sufficient bond as provided by the statute in such cases that they will on or before the first day of the next ensuing session of the United States circuit court, for the western district of Kentucky, Owensboro division file therein a transcript of the record of this action and for the payment of all costs *wjocj* may be awarded

by such court, if the said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this court proceed no further herein except to make the order of removal as required by law and to accept the bond presented herewith and direct a transcript of the record herein to be made for said court as provided by law and as in duty bound your petitioner will ever pray.

ST. BERNARD MINING CO.,
By JNO. B. ATKINSON, *President.*

—— ——, *Attorney.*

COMMONWEALTH OF KENTUCKY, }
County of Hopkins, } *ss:*

The affiant, John B. Atkinson, being first duly sworn according to law, deposes and says I am the president and chief officer of The Saint Bernard Mining Company, defendant in this action. I have read the foregoing petition and the allegations thereof are true to the best of my knowledge, information and belief.

JNO. B. ATKINSON.

[SEAL.] Subscribed and sworn to before me by Jno. B. Atkinson by me personally known to be the same, on this the 28th day of October, A. D., 1903.

JESSE PHILLIPS,
Notary Public, Hopkins County, Kentucky.

12 Hopkins County Court.

MADISONVILLE TRACTION COMPANY, Plaintiff, }
vs.
THE SAINT BERNARD MINING COMPANY, Defendant. }

Bond on Removal.

Know all men by these presents:—That we the Saint Bernard Mining Company as principal and George C. Atkinson, and Paul M. Moore as sureties, residents, of the county of Hopkins, Commonwealth of Kentucky, are held and firmly bound unto the Madisonville Traction Company, plaintiff, in the above styled cause, its successors and assigns in the sum of five hundred dollars, lawful money of the United States of America, for the payment of which, well and truly to be made we and each of us bind ourselves and each of us, our successors heirs, executors and administrators, jointly and severally, by these presents.

The conditions of this obligation are such that whereas the said The Saint Bernard Mining Company has applied to the Hopkins

county court in and for Hopkins county, Kentucky for the removal of a certain cause therein pending wherein Madisonville Traction Company is plaintiff and The Saint Bernard Mining Company is defendant, to the circuit court of the United States, for the western district of Kentucky; Owensboro division, for further proceedings on grounds in said petition set forth and that all further proceedings in said Hopkins county court be stayed.

Now therefore, if your petitioner The Saint Bernard Mining Company shall enter in said United States circuit court for the western district of Kentucky, Owensboro division, aforesaid, on or before the first day of the next regular session a copy of the records in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to be and remain in full force and effect.

Given under our hands this the 28th day of October, A. D., 1903.

ST. BERNARD MINING CO., *Principal,*
By JNO. B. ATKINSON, *President.*
GEO. C. ATKINSON.
PAUL M. MOORE.

Signed subscribed and sworn to before me by John B. Atkinson, George C. Atkinson and Paul M. Moore on this the 28th day of October, 1903.

13–15

My commission expires on the 16 day of Feb., 1906.

[SEAL.] JESSE PHILLIPS,
Notary Public, Hopkins County, Kentucky.

COMMONWEALTH OF KENTUCKY, }
County of Hopkins, } ss:

George C. Atkinson, and Paul M. Moore, the sureties in the foregoing bond being of lawful age and first duly sworn each for himself deposes and says:

I am the same person whose name is subscribed to the foregoing bond, and I state that I am a householder and resident of the county and Commonwealth aforesaid, and that I am worth the sum of five hundred dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

GEO. C. ATKINSON.
PAUL M. MOORE.

Subscribed and sworn to before me by George C. Atkinson, and Paul M. Moore, by me personally known to be the same and creditable persons, on this the 28th day of October, A. D. 1903.

My commission as notary public expires on the 16th day of February, A. D. 1906.

Given under my hand as notary public in and for said county and Commonwealth on this the 28th day of October, A. D. 1903.

[SEAL.] JESSE PHILLIPS,
Notary Public, Hopkins County, Kentucky.

A copy.

Attest: JOHN B. BRASHER, *Clerk*,
By W. T. MILLS, *D. C.*

16 *Description of Property to be Acquired of the St. Bernard Mining Company.*

A strip of ground 50 feet and 30 feet in width, the center line of which is described as follows:—A strip 50 feet wide lying 25 feet on each side of the following described line, to-wit:

"Beginning on the north line of the land owned by the St. Bernard Mining Co., at a point 80 feet in a westerly direction from the center of the track of the Louisville & Nashville R. R. measured at right angles thereto; thence in a southerly direction along the arc of a circle parallel to and 80 feet from the center of said track 1400 feet more or less to a point where a straight line drawn tangent to this curve would cross the Y or siding at station 216 plus 15 feet at a point 20 feet west of the point of a switch measured along the center of the track; thence in a southerly direction along this last described tangent to the point of curve at station 217; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, 120.44 feet and thence continuing in a southerly direction tangent to this curve 1264.59 feet to the center of the creek at station 230 plus 85 feet.

And a strip 30 feet wide lying 15 feet on each side of the following described line, to-wit: "Beginning at the center of the creek at station 230 plus 85 feet and extending in a southerly direction along the continuation of the last described line 115 feet to the point of a curve at station 232; thence curving to the left along the arc of a circle having for its radius 1432.69 feet a distance of 459.25 feet to a station 236 plus 59 26 feee; thence continuing in a southerly direction tangent to this curve and 30 feet east of and parallel to the fence between stations 236 plus 20 feet to and 241 feet for a distance of 717.22 feet to the point of curve at station 243 plus 76.48 feet and thence curving to the left along the arc of a circle having for its radius 125 feet, 85.55 feet to station 244 plus 62.03 feet continuing in a southerly direction tangent to this curve 293.45 feet and to the point of curve at station 247 plus 55.48 feet; thence curving to the right along the arc of a circle having for its raidus 125 feet, 85.55 feet to station 248 plus 41.03 feet and thence in a southerly direction tangent to this curve 234.97 feet to the north line of a strip

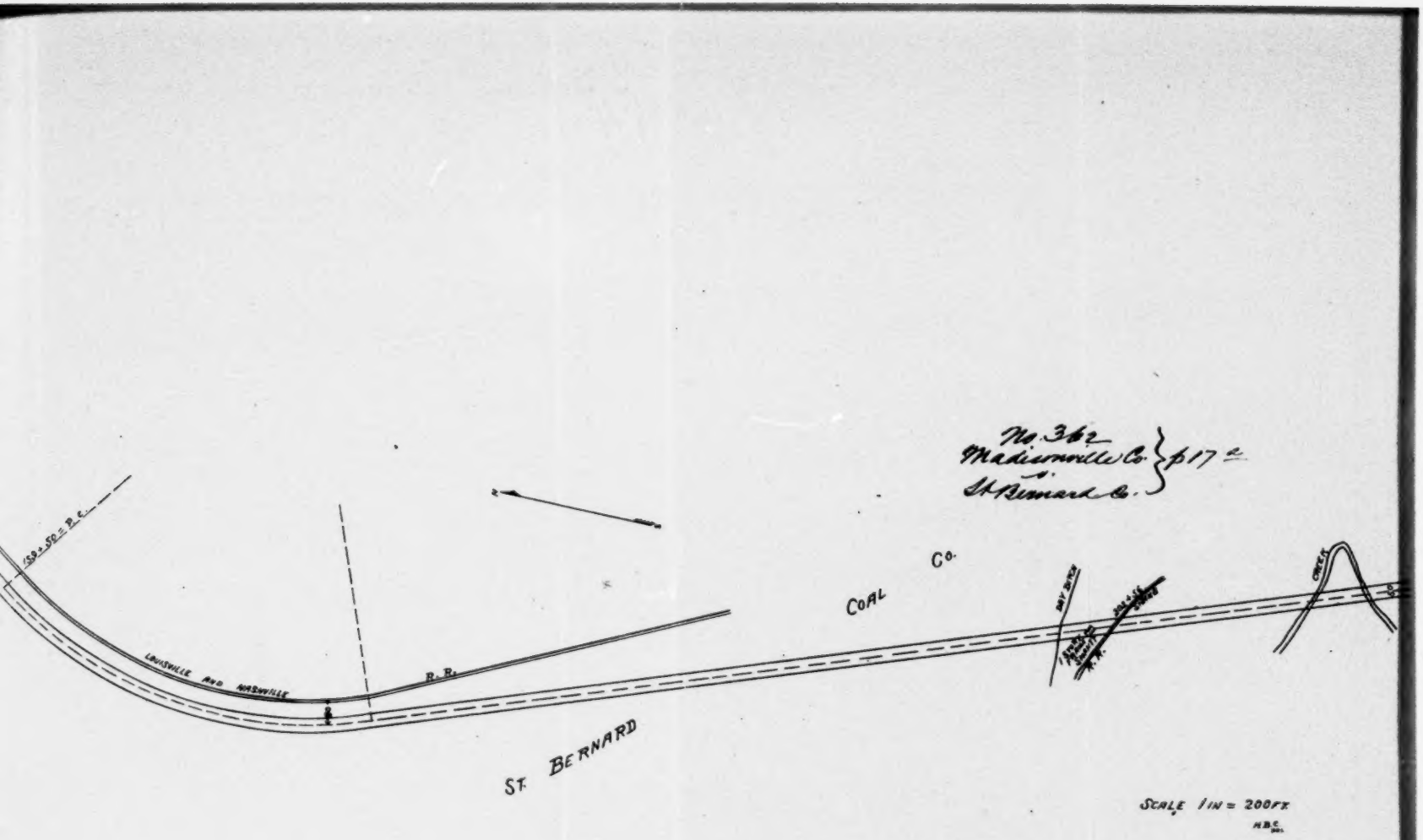
of ground known and used as Main avenue in the town of Earlington.

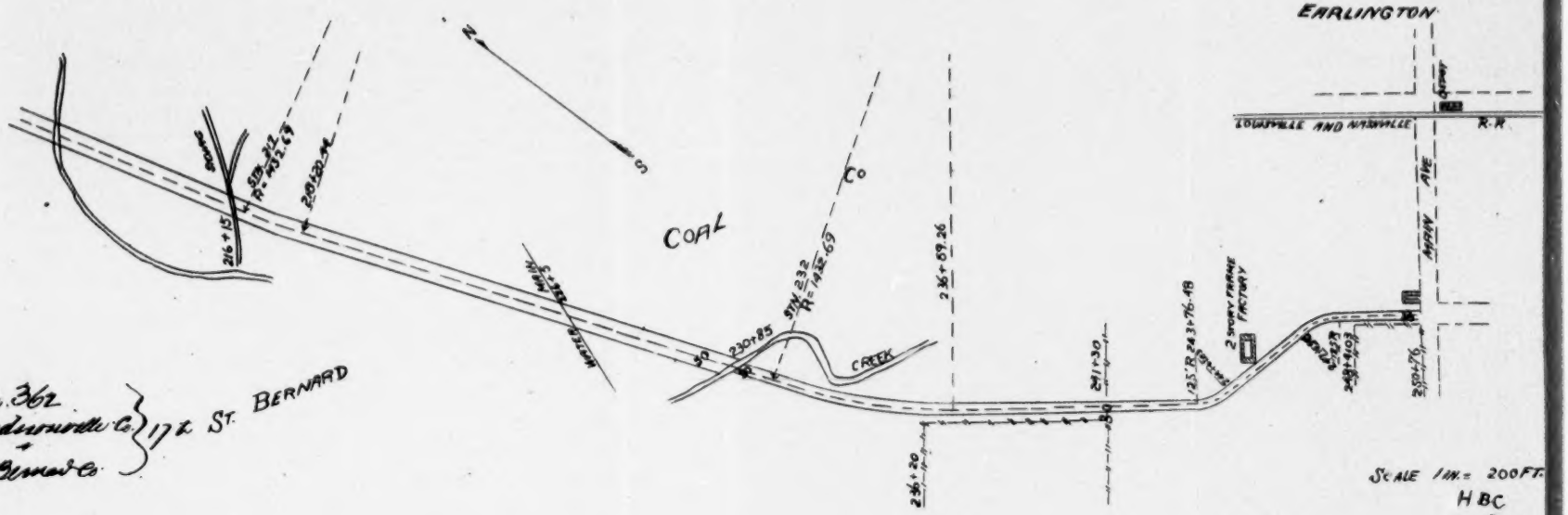
17 All of the above described land to be condemned and appropriated, has an area of 9.58 acres and is according to plat filed herewith and attached hereto.

A copy
Attest:

JOHN B. BRASHER, *Clerk*,
By W. R. MILLS, *D. C.*

(Here follow diagrams marked p. 17*a* and 17*b*.)


No 362
Madisonville Co.
St Bernard Co.
$17 a
Co.
COAL
LOUISVILLE AND NASHVILLE
R. R.
ST. BERNARD
SCALE 1 IN = 200 FT



No. 362
Madisonville Co } 17 & St. BERNARD
& St. Bernard Co.

SCALE 1 IN. = 200 FT.
H B C
Del.

18 Hopkins County Court.

MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
ST. BERNARD MINING COMPANY, Defendant.

Application to the County Court to Appoint Commissioners to Assess Damages to the Lands of the St. Bernard Mining Company.

The plaintiff, Madisonville Traction Company, states that it is a corporation created and existing under and by virtue of the laws of the Commonwealth of Kentucky, and that by virtue of its corporate capacity it is empowered and authorized to cons-*uct* and maintain a railroad running from Madisonville to Earlington, Hopkins county, Ky.

The plaintiff, Madisonville Traction Co. states that it is unable to contract with the defendant St. Bernard Mining Co., the owner of land necessary for its use as a right of way for t-e purpose of laying its tracks over and upon which it is necessary to operate its said line of railroad, that said land necessary for its use for the purpose of right of way, is embraced in a strip of ground thirty and fifty feet wide a particular description of which is filed in the office of the clerk of the county court, to which reference is made and asked to be made a part of this application, the same being marked "Description of property to be acquired of the St. Bernard Mining Co."

The plaintiff Madisonville Traction Co. says that by reason of the fact that it is unable to contract with the defendant St. Bernard Mining Co. for land necessary for its use as a right of way, therefore, same will have to be condemned, in order that it may enjoy its rights and privileges as guaranteed to it under the law.

Wherefore plaintiff prays that the court appoint three commissioners for the purpose of viewing the ground over and upon which said road is proposed to run, award defendants such damages as it must sustain by reason thereof and order them to report their action to the court in writing and for such relief as it may be entitled to.

RUBY LAFFOON,
Att'y for Madisonville Traction Co.

Copy

Attest:
JOHN B. BRASHER,
Clerk Hopkins County Court,
By W. T. MILLS, *D. C.*

19 Hopkins County Court, October Term, 1903.

Hon. W. D. STODGHILL, *P. J.*:

On this day came the Madinso-ville Traction Co. by its attorney and filed in the office of the clerk of the Hopkins county court a particular description of land which it seeks to condemn for the purpose of a right of way upon which to lay its tracks and operate an electric railroad which is proposed to run from Madisonville to Earlington in Hopkins county, and made application to this court to appoint three commissioners being house-keepers to view the land of the St. Bernard Mining Co. over which said railroad is proposed to run, the same being a strip of ground 30 and 50 feet wide and described as follows:—

Beginning on the north line of the land owned by the St. Bernard Mining Company at a point 80 feet in a westerly direction from the center of the track of the Louisville & Nashville R. R. measured at right angles theret- thence in a southerly direction along the arc of a circle parallel to and 80 feet from the center of said track 1400 feet more or less to a point where a straight line drawn tangent to this curve would cross the Y or siding at station 216 plus 15 feet, at a point 20 feet west of the point of switch measured along the center of the track; thence in a southerly direction along this last described tangent to the point of curve at station 217; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, 120.44 feet thence continuing in a southerly direction *b* tangent to this curve 1264.56 feet to the center of the creek at station 230 plus 85 feet.

And a strip 30 feet wide lying 15 feet on each side of the following described line, to wit:—

Beginning at the center of the creek at station 230 plus 85 feet and extending in a southerly direction along a continuation of the last described line 115 feet to the point of curve at station 232; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, a distance of 459.26 feet to station 236 plus 59.26 feet; thence continuing in a southerly direction tangent to this curve
30 feet east of and parallel to the fence between stations 236
20 plus 20 feet and 241 plus 30 feet for a distance of 717.22 feet to the point of curve at station 243 plus 76.48 feet and thence curving to the left along the arc of a circle having for its radius 125 feet, 85.55 feet to the station 244 plus 62.03 feet continuing in a southerly direction tangent to this curve 293.45 feet and to the point of curve at station 247 plus 55.48 feet thence curving to the right along the arc of a circle having for its radius 125 feet, 85.55 feet to station 248 plus 41.03 feet and thence in a southerly direction tangent to this curve 234.97 feet to the north line of a strip of ground known and used as Main avenue in the town of Earlington.

All of the above described land to be condemned and appropri-

ated has an area of 9.58 acres and is according to plat filed herewith and attached hereto.

And it appearing to the court that the law in such cases made and provided having been complied with, it is now ordered that A. Y. Kennedy W. E. Carlisle and W. P. Hopgood, three disinterested and impartial housekeepers of Hopkins county, be and they are appointed commissioners to view the land proposed to be condemned for the purpose of a right of way by the Madisonville Traction Company and they will report to this court on or before ten days previous to the regular November term thereof. It will be your duty to view the land and to award to the St. Bernard Mining Company the value of said land taken which shall be stated in your report; and you will also award the damage, if any, resulting to the adjacent land of the St. Bernard Mining Company, considering the purpose for which it was taken; but you shall deduct from such incidental damages the value, if any, of the advantages and benefits as will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. You shall return a report in writing to the office of the clerk of the Hopkins county court stating your award and you shall describe in your report the land condemned, give the name- of the owners, and whether non-residents of the State, infants, of unsound mind, or married women, and this action is continued until your report is filed herein. Ordered that court adjourn.

W. D. STODGILL, *Judge.*

A copy.
Attest:

JOHN B. BRASHER,
Clerk Hopkins Count-, Ky., Court,
By R. W. MIFFLIN, *D. C.*

Executed by delivering a true copy of this summons to W. E. Carlisle, W. P. Hobgood and A. Y. Kennedy, Oct. the 10th. 1903.

W. E. ASHBY, *S.* —.

21 A copy
Attest:

JOHN B. BRASHER,
Clerk Hopkins County Court,
By W. T. MILLS.

Hopkins County Court.

MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
ST. BERNARD MINING COMPANY, Defendant.

Report of Commissioners Herein.

We, the undersigned, commissioners appointed by the county court to assess the damages the St. Bernard Mining Company, the owner

of the land may be entitled to receive by reason of its land being sought to be condemned for the purpose of a right of way for the Madiconsille Traction Company, over across and upon the lands of the said St. Bernard Mining Company, beg leave to make the following report:—

We, the undersigned commissioners, after having been duly sworn, to faithfully an- impartially discharge our duties under t-e law, did go upon and over the land of the said St. Bernard Mining Company, it being the owner thereof, and being the land sought to be condemned by the Madisonville Traction Company for its right of way, and being a strip of ground fifty feet wide from the north line of the land owned by the said St. Bernard Mining Company, at a point eighty feet in a westerly direction from the center of the tract of the Louisville and Nashville Railroad Company measured at right angles thereto, and running in a southerly direction along the arc of a circle parallel to and eighty feet from the center of said tract fourteen hundred feet more or less to a point where a straight line drawn tangent to this curve would cross the " Y " or siding of the St. Bernard Mining Company's switch, at a point twenty feet west of the point of the switch measured along the center of the track; thence in a southerly direction along this last described tangent to the point of a curve at station marked by a stake driven in the ground and numbered 217; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, 120.44 feet, and thence continuing in a southerly direction tangent to this curve 1264.56 feet, to the venter of the creek at station 230 plus 85 feet.

And a strip of ground thirty feet wide lying fifteen feet on each side of the following described line, to wit:—

22 " Beginning at the center of the creek at station 230 plus 85 feet and extending in a southerly direction along the continuation of the last described line 115 feet to the point of curve at station No. 232, marked by a stake driven in the ground; thence curving to the left along the arc of a circle having for its radius 1432.69 feet, a distance of 429.26 feet to station 236 plus 59.26 feet, said station being marked by a stake *a stake* driven in the ground; thence continuing in a southerly direction tangent to this curve and thirty feet east of and parallel to the fence between stations 236 plus twenty feet and 241 plus thirty feet for a distance of 717.22 feet to the point of curve at station 243 plus 76.48 feet and thence curving to the left along the arc of a circle having for its radius 125 feet, 85.55 feet to station 244 plus 62.03 feet continuing in a southerly direction tangent to the curve 293.45 and to the point along the arc of a circle having for its radius 125 feet, 85.55 feet to station 248 plus 41.03 feet and thence in a southerly direction tangent to this curve 234.97 feet to the north line of a strip of ground known and used as Main avenue in the town of Earlington. The said line being distinctively marked from the beginning at the north edge of the St. Bernard Mining Company's land to its terminus at Main street in the town of Earlington by stakes or stobs driven in the ground

and consecutively numbered, the same being one hundred feet apart and being the same land particularly described by a statement filed in the office of the clerk of the Hopkins county court and drawing attached thereto. We further find that all the land over which the Madisonville Traction Company proposes to construct its right of way as shown in the description and drawing referred to herein is owned by the St. Bernard Mining Company, with the exception of a small lot of ground located near the north of the Hecla switch, which is owned by E. McLeod, further, that the St. Bernard Mining Company is a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, being a non-resident of the State but with its principal place of business at Earlington, Hopkins county, Kentucky.

After having carefully viewed the ground or land sought to be condemned by the Madisonville Traction Company for the
23 purpose of a right of way over across and upon the land of the St. Bernard Mining Company as described therein, we hereby award to the St. Bernard Mining Company the owner of land aforesaid, the sum of one hundred dollars ($100.00) that being the value of the land taken for the purpose mentioned herein we do not award any sum in damages resulting to the adjacent lands of the St. Bernard Mining Company, the owner as aforesaid, considering the purpose for which said land is taken, but report thar the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed will be largely in excess of any damages that will accrue, in fact, we do not believe any damages will result whatever. All of which is most respectfully submitted.

Given under our hands this the 16th day of October, 1903.

A. Y. KENNEDY.
W. P. HOBGOOD.
W. E. CARLISLE.

Commissioners' fees: —.
A. Y. KENNEDY.
W. P. HOBGOOD.
W. E. CARLISLE.

A copy.
Attes-:

JOHN B. BRASHER,
Clerk Hopkins County, Ky., Court,
By W. T. MILLS, *D. C.*

24 Upon which there issued the following process:

The President of the United States of America to the Madisonville Traction Company, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the western district of Kentucky, at the Federal Court hall in the city of Owensboro, on the first

Monday in February next, to answer a bill in equity exhibited against you in our said court, by Saint Bernard Mining Company, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the [SEAL.] seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville this 2nd day of January, A. D., 1904, and in the 128th year of our Independence.

THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the clerk's office on or before the 1st day of February, next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk.*

Upon which the marshal made the following return:

Received the within subpœna in ch'y January 2nd, 1904 and executed same January 5th, 1904 in Louisville Ky. on Madisonville Traction Company by delivering a true copy hereof to Joseph Huffaker, president of said company. This January 5th, 1904.

A. D. JAMES, *U. S. M.*,
By WM. BLADES, *D. M.*

25 And on another day of said court to wit on the 6th day of January 1904, came the complainant by Wm. L. Gordon, E. G. Sebree and Edmund F. Trabue its counsel, and filed a notice duly executed on the defendant and moved the court for an interlocutory injunction as prayed for in its bill of complaint herein.

This cause being argued by William L. Gordon, E. G. Sebree and Edmund F. Trabue for complainant and David W. Sanders and Hite Huffaker, for defendant and submitted on complainant's motion for an interlocutory injunction, and the court being advised, it is ordered by the court that the defendant, its officers, agents and employees, and each of them be and they are enjoin3d and restrained until the further order of the court from further prosecuting or causing to be prosecuted, the proceeding instituted by the defendant against complainant in the county court of Hopkins county, Kentucky, and from taking any steps, or causing any orders to be made therein, or taking any proceeding whatever therein, and from entering upon the land or any part thereof which the said defendant is in said proceeding attempting to condemn and appropriate.

And leave is given to complainant to apply to the court on the first day of its next session at Owensboro, Kentucky, being the

second day of May, 1904, for an extension of this interlocutory order of injunction, *pendente lite.*

The return on said injunction is as follows:—

Executed January 6th, 1904 on Madisonville Traction Company by delivering a true copy hereof to Joseph Huffaker, president of said company.

This January 7th, 1904.

A. D. JAMES, *U. S. M.*,
By WM. BLADES, *D. M.*

26 And on the 2nd day of May, 1904, came the complainant by Gordon, Gordon & Cox, and E. G. Sebree its counsel; came also the defendant by D. W. Fairleigh and H. H. Huffaker its counsel.

The complainant by counsel moved the court for an extension *pendent- lite* of the interlocutory order of injunction, entered herein January 6th, 1904, and the court not being advised thereof, takes time.

And on the same day to wit on the 2nd day of May, 1904, came the complainant by Gordon, Gordon & Cox, and E. G. Sebree, its counsel. Came also the defendant by David W. Fairleigh its counsel; the complainant by its said counsel filed the joint affidavit of Frank D. Rash, I. Bailey and W. L. Gordon, Jr., herein; came again the defendant by its said counsel, and filed its demurrer to the bill of complaint herein; this cause coming on to be heard upon said demurrer and having been argued by counsel and the court not being advised thereof, takes time.

27 The demurrer above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky, Owensboro Division.

ST. BERNARD MINING COMPANY, Plaintiff,
vs.
MADISONVILLE TRACTION COMPANY, Defendant. } Demurrer to Bill.

The demurrer of Madisonville Traction Company, defendant, to the bill of complaint of The St. Bernard Mining Company, the above named complainant.

This defendant by protestation, not confessing or acknowledging all or any of the things and matters in the said comp-ainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

1. That the matters and things in the said bill of complaint stated and averred are not sufficient in law to constitute a cause of

action against this defendant, and are not sufficient to authorize the court to grant to the said complainant the relief or any part thereof which is prayed for in the bill.

2. The court is without jurisdiction or power and is not authorized under the Constitution and laws of the United States to grant the injunction prayed for in the bill or to grant any other or like relief.

Wherefore and for divers other errors and imperfections appearing in the said bill, this defendant humbly prays the judgment of this honorable court whether it shall be compelled to make any answer to said bill.

H. H. HUFFAKER,
FAIRLEIGH, STRAUS & FAIRLEIGH,
Counsel for Defendant.

David W. Fairleigh says that he is counsel for the defendant and the foregoing demurrer is in his opinion well founded in point of law.

DAVID W. FAIRLEIGH.

Joseph Huffaker says he is president of the defendant The Madisonville Traction Company, and the foregoing demurrer is not filed or interposed for delay.

JOSEPH HUFFAKER.

Subscribed and sworn to by Joseph Huffaker before me this 29th day of April, 1904. My commission expires Feb. 12, 1906.

[SEAL.] H. H. HUFFAKER,
Notary Public, Jefferson Co., Kentucky.

28 And on the 27th day of May, 1904, the following order was entered :

The court being now fully advised of the defendant's demurrer to the complainant's bill of complaint herein, and of the complainant's motion for an extension of the interlocutory order of injunction *pendente lite* heretofore entered herein, delivered an opinion in writing, which is ordered to be filed and made part of the record, and in accordance therewith it is ordered, adjudged and decreed by the court that said demurrer be and the same is hereby overruled.

It is further ordered adjudged and decreed by the court that an injunction *pendente lite* issue enjoining the defendant, its officers, agents and employees and each of them from further prosecuting or causing to be prosecuted the proceeding instituted by the defendant against the complainant in the county court of Hopkins county, Kentucky, and from taking any steps or causing any orders to be made therein, or taking any proceeding whatever therein and from entering upon the land or any part thereof, which the said defendant is in said proceeding attempting to condemn and appropriate.

It is further ordered adjudged and decreed by the court that said

injunction shall not issue until complainant shall execute to the defendant with good security to be approved by the court, a bond in the penal sum of one thousand dollars, conditioned that the said complainant will pay to the said defendant any damages that it may sustain by reason of the issuing of said injunction if it be finally determined that said injunction ought not to have been granted.

Bond omitted by consent of parties.

29 The opinion above referred to is as follows:

United States Circuit Court, Western District of Kentucky, at Owensboro.

ST. BERNARD MINING COMPANY, Plaintiff,
vs.
THE MADISONVILLE TRACTION COMPANY, Defendant.

Opinion.

The defendant, a citizen of Kentucky, having instituted a proceeding in the Hopkins county court, to condemn to its own uses certain real estate belonging to the complainant, a citizen of Delaware, the latter removed that proceeding to this court. Subsequently it filed its bill of complaint stating the grounds upon which it asked the court, in aid of its jurisdiction in the other proceeding and to prevent irreparable injury to the complainant to enjoin the defendant from further proceedings in the State court. The defendant demurred to the bill.

In view of the peculiarities of that litigation and the great inconvenience that might otherwise result, the court originally granted the temporary restraining order against the traction company for those reasons and upon the idea that the case for the condemnation of the land was certainly removable and that it certainly had been removed. Those reasons still apply with undiminished force.

When the proper steps for removal have been taken the statute—the supreme law of the land, binding upon all courts, State and Federal alike—expressly enjoins that the State court shall proceed no further in the cause. The court in its opinion this day delivered upon the motion to remand the condemnation suit, has, as it os believe l, shown that it now has jurisdiction of that case. This being so, the power of the court to grant the injunction, if, on the facts, it becomes advisable, seems clear under the authorities, for, notwithstanding the provisions of section 720, the courts hold that in removal cases they may, where it seems necessary to the ends of justice, protect their jurisdiction by enjoining the plaintiff from proceeding further

30 with the action in the State court. This is in part upon the ground that by the removal the State court has been deprived of jurisdiction, and that thereafter the Federal court alone has it. French *vs.* Hay, 22 Wallace, 253; Moran *vs.* Sturges 154 U. S. 269,

270; Black's Dillon on Removal of Causes, section 194, and the numerous cases cited; Dietzsch *vs.* Huidekoper 103 U. S. 494, and its attendant case Kern *vs.* Huidekoper 103 U. S. 483; Abeel *vs.* Culberson 56 Fed. 329, Wagner *vs.* Drake, 31 Fed. 849; B. & O. R. R. Co. *vs.* Ford, 35 Fed. 170; Frishman *vs.* Insurance Co. 41 Fed. 449; Terre Haute &c., R. R. Co. *vs.* Peoria &c. R. R. Co. 82 Fed. 943. In the last of these cases at page 946, Judge Grosscup said:

"The removal statutes have in substance from the original judiciary act to the present time, provided that any suit of a civil nature at law or in equity, of which the circuit courts of the United States are given jurisdiction, shall be removable. It seems plain that if the Federal court cannot protect its jurisdiction by restraining all proceedings in the State court destructive thereof, the whole case is not, in fact removed. Indeed had not the right of such injunction upon State proceedings been sustained in Dietzsch *v.* Huidekoper, the Federal court would by the removal, have obtained nothing but the shell of the case, while its substance—the real power affecting the interests of the parties—would have remained in the State court.

"These statutes, conferring jurisdiction in all cases arising in law or in equity, where certain conditions exist, were not intended to confer merely fractional jurisdiction. The right of the Federal court to take cognizance of the controversies arising in such cases, with all the remedies usually applied to law and in equity, was clearly contemplated. Section 720 could never have been intended to trench upon this grant of jurisdictional domain. Such interpretation would imply an intention on the part of Congress to repeal a portion of the power expressly given to the courts both by the Constitution and the judiciary act. In their literal scope, the Constitution and statutes conferring jurisdiction, and this section 720, are in conflict, and to the extent of such conflict the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the Supreme Court of the United States, of which they are a development,
31 clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation."

The demurrer to the bill is accordingly overruled, and, as it seems necessary to the ends of justice, the motion of the mining company for the injunction *pendente lite*, will be sustained. A copy of the opinion referred to is annexed to this opinion as a part thereof, and with it will be filed as part of the record in the case.

United States Circuit Court, Western District of Kentucky, at Owensboro.

THE MADISONVILLE TRACTION COMPANY, Plaintiff,
vs.
THE ST. BERNARD MINING COMPANY, Defendant.

Copy of Opinion.

This is a proceeding under the Kentucky statutes instituted in the county court of Hopkins county by The Madisonville Traction Company a citizen of Kentucky, against The St. Bernard Mining Company, a citizen of Delaware, for the condemnation of certain lands in that county belonging to the mining company for the uses of the traction company. Without notice to the mining company the county court appointed commissioners who valued the land said by the traction company to be needed for its uses, and returned their report to the county court. Upon its being filed, process was served upon the mining company. Thereupon, and in due season, it removed the case to this court. The traction company has moved to remand it to the State court and urges that step upon grounds which will be developed in the course of what is about to be said.

If the Commonwealth of Kentucky by a similar proceeding were seeking to condemn for its own public purposes the land of the St. Bernard Mining Company, say for a court-house or a jail, no doubt could arise upon the question of whether the proceeding could be removed from the State court to this court. It could not be removed for one all-sufficient reason which would meet the attempt at the threshold; namely there would be no adverse citizenship, inasmuch as the State, for jurisdictional purposes, is not to be treated
32 as a citizen, within the meaning of that term as used in the judiciary act. Postal Telegraph Co. *vs.* Alabama, 155 U. S. 487. But here the Commonwealth of Kentucky is not a party to the litigation, either actually or formally. The Madisonville Traction Company alone is the party, the litigant, the actor. It is true that this company is using power conferred by State laws, but so also do all litigants who come into the courts of the State to enforce rights conferred by its laws, written or unwritten. The traction company, a citizen of Kentucky, being the sole litigant, the sole actor, on one side, and the mining company, a citizen of Delaware, being the sole litigant and respondent, on the other, the contestation is between those two citizens alone, and the amount in controversy being shown to exceed $2000 exclusive of interest and cost, the other question is whether this proceeding is a "suit of a civil nature" and one of which this court might have had jurisdiction if it had been brought here in the first instance. That it is a suit of a civil nature admits of no doubt. Kohl *vs.* United States 91 U. S. 367; Boom Co. *vs.* Patterson, 96 U. S. 406; Searl *vs.* School District 124

U. S. 199; Union Terminal Co. *vs.* Chicago &c. Ry. Co., 119 Fed. 209; Kirby *vs.* Chicago &c. Ry. Co. 106 Fed. 551.

It seems to me also inasmuch as there was in each one of those cases, except the first named, a removal which was sustained although the proceeding was to condemn land by a corporation, that they, at least inferentially, establish the distinction already noticed, that while proceedings for that purpose by the State itself could not be removed, yet that the same reasons do not by any means apply to cases where corporations use the power given to them by the legislature to condemn to their own uses lands which belong to another. The argument of the learned counsel for the traction company is ingenious and plausible but I think overlooks the distinction referred to.

It seems to the court, after a careful examination of them, that there is nothing in the actual decisions of the court in Boom Co. *vs.* Patterson 98 U. S. 404 Searles *vs.* School District, 124 U. S. 197, and Mexican &c. R. R. *vs.* Davidson, 157 U. S. 200 which at all conflicts with the view just expressed, although those cases are greatly relied on by counsel.

So much of the judiciary act of 1887–8 as is applicable to the point we are discussing is in this language:

33 "SEC. 1. That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and * * * in which there shall be a controversy between citizens of different States in which the matter exceeds, exclusive of interest and costs, the sum or value aforesaid * * * But * * * no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

"SEC. 2. That any suit of a civil nature at law or in equity * * * of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, *being non residents of that State.*" (1 Compiled Stats. 1901, 508–9)

It may at this point be observed that the last words in section 2 which I have quoted and italicized have been construed to be equivalent to the words "not being citizens of that State." Martin *vs.* B. & O. R. R. Co., 151 U. S. 676–7. And it may also be remarked that it has been conclusively settled that in suits of a civil nature the *jurisdiction* given by the statute depends alone upon the diverse citizenship of the parties and the amount in controversy, while those parts of the

statute which relate to "inhabitancy" and "residence" are matters which affect the personal privilege of venue only and not *jurisdiction* as such. McCormick & Co. *vs.* Walthers, 134 U. S. 41; Shaw *vs.* Quincy Mining Co., 145 U. S. 448; Martin *vs.* B. & O. R. R. Co., 151 U. S. 676 *In re* Keasby & Mattison Co. 160 U. S. 229; Simonton in Empire &c. Co. *vs.* Propeller &c. Co. 108 Fed. 900, and Whitworth, *vs.* Ill. Cent. R. R. Co., 107 Fed. 557.

In its opinion in Mexican Nat'l R. R. Co. *vs.* Davidson 157 U. S. at the bottom of page 208, the court in speaking of the provisions of the act of 1887-8 says:

34 "Section 2, however, refers to the first part of section one by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

It may not be amiss to remark that these cases in no wise appear to conflict with the case of Tennessee *vs.* Union & Planters Bank, 152 U. S. 454, much relied on by counsel. The syllabus in that case very accurately expresses the exact point of that decision.

But it seems quite unnecessary to pursue further this phase of the subject, and we proceed to the consideration of the proposition most pressed in behalf of the traction company, which, stated generally, is that the case is not removable at all as to that part of it which seeks to condemn the land, though it is admitted that that part of the case involving the mere ascertainment of compensation may possibly be so. In other words, it seems to amount to this, that the basic controversy, viz., that involved in the claim to the land, cannot be removed because that is to be settled by the exercise of the right of eminent domain, but that its inevitable incident —the ascertainment of compensation—possibly may be removed.

In disposing of this contention, I think we may assume at all events that we have here a suit of a civil nature, the parties to which are citizens of different States, and that there is a matter in controversy which exceeds in amount $2,000 exclusive of interest and costs. Of such a suit this court would undoubtedly have had original jurisdiction even if it were a condemnation proceeding. It would come literally within the express language of the statute Where those three jurisdictional prerequisites coexist, either party, under section one of the act, may bring its suit in this court, and this would be so whether the suit were to enforce a mortgage, a note, a trust or any right created by a statute of the State. The fact that it is exceedingly seldom that such a proceeding as this is instituted in the Federal courts does not make it impossible or unlawful for it to be done. On the contrary, the rule, with a few exceptions not pertinent here, is established by an unbroken line of authorities that where a State statute gives any remedy which is available in a State court it is also available, if other jurisdic-

35 tional requisites are present, in the Federal courts, although those courts are not mentioned in the statute. This is said to be axiomatic in Federal jurisprudence. *Ex parte* McNeil, 13 Wall. 243, and many subsequent cases. So that in the proper sense this

court would have had jurisdiction of this action if it had been originally brought here by the traction company. Union Terminal Co. *vs.* Chicago &c. R. R. Co. 119 Fed. 209. If the proceeding had been instituted here this court would have been bound to give to the traction company the exact relief which it would be entitled to under the State law—no more, no less. It must be presumed that it will do so now. So that it is only a question of the right of the respondent to choose the tribunal to try the case. This right is given by the supreme law of the land.

When this case was first brought to my attention upon a motion for a temporary restraining order made in a suit in which that relief was sought, the question of the court's jurisdiction in this proceeding necessarily suggested itself and was somewhat considered. The cases above referred to, or most of them, were then examined.

Now a distinction is urged by the learned counsel for the plaintiff to the effect that this case only involves questions concerning the assessment of damages and must be limited to that phase of it in this court, but even if this be true it cannot affect the motion to remand, which would have to be overruled, if, upon any ground, the case is properly here. They insist that the preliminary proceedings in the county court, of which the mining company had no notice until after the report was filed, exerteed, beyond recall, the power of eminent domain, condemned the land to the uses of the traction company and vested in it all the owner's title thereto. While possibly, it may be premature to pass upon this question, I cannot refrain from now saying that it seems to me that this proposition is wholly unmaintainable. As the contention points out, it would leave nothing to be done here except to consider the mere reassessment of values and compensation. It assumes that the mere condemnation part of the case was finally concluded when the process on the commissioners' report was issued and served, and could not be affected by a hearing before the court, an opportunity for which was supposed to be afforded by the service of process. In short
36 it assumes that the most important part of the case ended before the service of process, leaving only remnants of the controversy to be wound up thereafter. While it is ably urged, the court finds itself unable to yield to the contention. It would require the anomalous conclusion that the principal object of the litigation was achieved before the suit was begun. The litigation—the suit—against the mining company was begun when the process was first issued, and that company then for the first time was tendered a day in court. Not till then did a controversy arise or begin. Then a suit of a civil nature was commenced. (Civil Code of Practice section 39) The object of that suit was to take from the mining company its property and confer title thereto upon the traction company, the latter first paying therefor just compensation. This required a judicial proceeding but only one, not two. Counsel would have the court divide this suit into two separate and distinct parts, treating one of those parts; namely, the controversy respecting the title to

the land as having been finally and conclusively settled by the preliminary proceeding taken in the county court, without notice to the owner and therefore as not being removable, and the other part; namely, that which involves the settlement of the compensation only as still being open and removable. But it seems to me that this division would be wholly artificial, not to say arbitrary, and without any warrant in law. The mining company, the owner of the land, has the right to litigate in the courts, the right of the traction company to take its land at all, as well as the right to compensation therefor. The chief object the traction company has in view is the acquirement of the land and that is the principal element of the litigation. Its interest in the other matter is quite secondary and incidental and it follows that if anything is removable it is the entire suit, in all its parts, root and branch. In any event, and even if the distinction drawn by the counsel is well conceived, the case was well removed as to the question of compensation and the motion to remand cannot prevail.

It seems to me that the motion should be overruled, and it is accordon-ly so ordered.

37 And on the 4th day of July, 1904, on motion of the defendant The Madisonville Traction Company by Messrs. Fairleigh, Straus & Fairleigh, its counsel, it is ordered that this cause be and the same is hereby submitted.

38 And on the 26th day of July, 1904, the following decree was entered:

The defendant's demurrer to the bill herein having been heretofore considered and overruled, and the said defendant standing by its demurrer and declining to answer the bill, set this cause at rules for final hearing upon the bill, and this cause having been submitted and coming on now finally to be heard, there was read on the hearing the bill of complaint, the defendant's demurrer thereto, the court's order overruling the same, the order of injunction *pendente lite*, and the transcript of the proceedings in the Hopkins county court filed by the complainant in this court, and which is referred to in the bill, and therein asked to be read, and the court being now sufficiently advised, finds that it has jurisdiction of the cause and that the equity of the case is with the complainant, The Saint Bernard Mining Company as against the said defendant, The Madisonville Traction Company, and that the said complainant is entitled to some relief against said defendant;

It is therefore accordingly ordered, adjudged and decreed by the court that the defendant Madisonville Traction Company its officers, agents and employés and each of them, be and they are perpetually enjoined and restrained from further prosecuting or causing to be prosecuted in the Hopkins county court, the proceeding described in the bill of complaint, and which was instituted by the said defendant against the said complainant in the Hopkins county court, and from taking any steps therein, in said county court, or causing any

orders to be made by said county court in said proceeding or taking any proceeding whatever therein in said county court, and from entering upon the land described in said proceeding or any part thereof, under any order of said county court in said proceeding. It is further ordered, adjudged and decreed that the complainant Saint Bernard Mining Company, recover of the defendant Madisonville Traction Company — objected and excepted.

The court certifies and states that one issue considered and adjudged upon the demurrer to the bill of complaint and upon the final hearing of the cause, was whether the court had jurisdiction of this action or to grant the relief prayed for, by the complainant or any part of it. The court held that it had jurisdiction to grant the relief herein adjudged and the question of jurisdiction alone
39 is now certified under the act of Congress to the Supreme Court of the United States for decision.

The defendant, Madisonville Traction Company thereupon filed its petition for an appeal to the United States Supreme Court, and also its assignment of errors, and it is ordered that said appeal be and it is granted and allowed, and the amount of bond on said appeal is fixed at $500.00 and thereupon the said defendant filed its bond in due form as required by law with the Fidelity and Deposit Company of Maryland, as surety, which bond is approved.

40 The petition for appeal above referred to is as follows:

Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division.

SAINT BERNARD MINING COMPANY, Complainant,
vs.
MADISONVILLE TRACTION COMPANY, Defendant.

Petition for Order Allowing Appeal.

To the Honorable Walter Evans, district judge of the United States for the western district of Kentucky, and one of the judges of the above named court, presiding therein:

The above named defendant, The Madisonville Traction Company, conceiving itself aggrieved by the final order and decree made and entered in the above named court in the above entitled cause, wherein and whereby among other things, the injunction granted *pendente lite* was made perpetual and wherein and whereby it was perpetually enjoined and restrained from further prosecuting or causing to be prosecuted the proceeding instituted by it (the said defendant) against The Saint Bernard Mining Company, the said complainant in the county court of Hopkins county, and from taking any steps or causing any orders to be made therein, or taking any proceeding whatever therein, and from entering upon the land, or any part thereof, which the said defendant is in said proceeding attempt-

ing to condemn and appropriate, does hereby appeal from said final order and decree to the United States Supreme Court for the reasons set forth in the assignment of errors which is filed herewith; and it prays that this its petition for said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said final order and decree was made, duly authenticated may be sent to the United States Supreme Court.

H. H. HUFFAKER,
FAIRLEIGH, STRAUS & FAIRLEIGH,
Counsel for Defendant.

41 The assignment of errors above referred to is as follows:—

Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division.

SAINT BERNARD MINING COMPANY, Complainant,
vs.
MADISONVILLE TRACTION COMPANY, Defendant.

Assignment of Errors.

Comes now the defendant Madisonville Traction Company, and files the following assignment of errors:—

1. That the United States circuit court, in and for the sixth circuit, western district of Kentucky, Owensboro division, erred in overruling the demurrer interposed by the defendant to the bill of complaint filed in said cause.

2. The said court erred in granting the preliminary order of injunction and in extending said injunction *pendente lite*.

3. The said court erred in making said injunction granted *pendente lite*, perpetual, and erred in perpetually enjoining and restraining the defendant from further prosecuting or causing to be prosecuted the proceeding instituted by said defendant against the said complainant in the county court of Hopkins county, and from taking any steps or causing any orders to be made therein, or taking any proceeding whatever therein, and from entering upon the lands, or any part thereof, which the said defendant is in said proceeding attempting to condemn and appropriate, and the said court erred in granting and in making perpetual any injunction whatever against the defendant.

4. The said court erred in failing and refusing to dismiss the complainant's bill of complaint.

5. The said court erred in holding and adjudging that the proceeding instituted by the defendant Madisonville Traction Company against the comp-ainant Saint Bernard Mining Company, in the Hopkins county Kentucky court, was or is transferrable to the United States circuit court, and erred in holding that the United States circuit court, had and has jurisdiction of said proceeding.

6. The said court erred in holding and adjudging that it
42 had or has any jurisdiction whatever to make or grant any injunction against the said defendant.

Wherefore, the said defendant, Madisonville Traction Company, prays that the said judgment of said court be reversed and that the said court be directed to dismiss absolutely the said bill of complaint.

H. HUFFAKER,
FAIRLEIGH, STRAUS & FAIRLEIGH,
Counsel for Defendant.

43 The bond above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky, Owensboro Division.

SAINT BERNARD MINING COMPANY
vs.
MADISONVILLE TRACTION COMPANY.

Know all men by these presents, that we, the Madisonville Traction Company as principal and the Fidelity & Deposit Company of Maryland, are held and firmly bound unto Saint Bernard Mining Company, in the sum of five hundred dollars, to be paid to the said Saint Bernard Mining Company executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our, and each of our, heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of July, A. D., 1904.

Whereas the above named Madisonville Traction Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit, by the circuit court of the United States, for the western district of Kentucky, at Owensboro.

Now therefore, the condition of this obligation is such that if the above named Madisonville Traction Company shall prosecute its said appeal to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MADISONVILLE TRACTION CO.,
By JOSEPH HUFFAKER, *President.* [L. S.]
[SEAL.] FIDELITY & DEPOSIT CO. OF MD.,
By WILLIS S. MULLEN,
Gen. Ag't & Att'y in Fact. [L. S.]

Sealed and delivered in presence of
HENRY F. CASSIN,
Deputy Clerk, U. S. Courts.

Approved July 26th, 1904,
WALTER EVANS, *Judge.*

44 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States, for the western district of Kentucky, at Owensboro do hereby certify that the foregoing 43 pages contain a true and correct transcript of the record and proceedings in the case of The Saint Bernard Mining Company *vs.* The Madisonville Traction Company No. 146 as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 26th day of August, 1904.

[Seal 6th Circuit Court, Wes. Dis. Ky., U. S. of America.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

45 UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, Owensboro Division, } *ss:*

To The Saint Bernard Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, D. C., on the* 5th day of September next, pursuant to an appeal allowed by the circuit court of the United States for the western district of Kentucky, Owensboro division wherein The Madisonville Traction Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal 6th Circuit Court, Wes. Dis. Ky., U. S. of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of August, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty ninth.

WALTER EVANS, *Judge.*

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* Not exceeding 30 days from the day of signing.

Filed August 23rd, 1904.

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

46 I hereby accept service of the within citation.
August 23rd, 1904.

E. G. SEBREE,
Counsel for Appellee.

Endorsed on cover: File No. 19,462. W. Kentucky C. C. U. S. Term No. 362. The Madisonville Traction Company, appellant, *vs* The Saint Bernard Mining Company. Filed September 1st, 1904 File No. 19,462.

Supreme Court of the United States,

OCTOBER TERM, 1904.

THE MADISONVILLE TRACTION COMPANY, . . *Appellant*,

vs.

THE SAINT BERNARD MINING COMPANY, . . *Appellee*.

MOTION.

The appellant, the Madisonville Traction Company, moves the court to advance this cause for hearing and decision, under Rule 32 of this court, on the ground that the only question in issue is the question of the jurisdiction of the court below.

BRIEF ON MOTION.

The appellant, the Madisonville Traction Company, hereinafter called the Traction Company, is a Kentucky corporation, with corporate power to build a line of railroad, and operate cars thereon, with electricity as the motive power.

The appellee, the Saint Bernard Mining Company, hereinafter called the Mining Company, is a Delaware corporation, owning a large tract of land in Hopkins County, Kentucky, and carrying on the business of mining coal therefrom.

The projected line of railroad of the Traction Company runs through the lands of the Mining Company, and the Traction Company, being unable to agree with the Mining Company for the acquisition of the needful right of way, instituted condemnation proceedings in the Hopkins County Court, seeking to condemn a defined portion of the lands of the Mining Company as a right of way for the railroad.

These proceedings were instituted in accordance with the statute laws of Kentucky providing for the condemnation of private property for railroad uses. The statutes of Kentucky providing for the condemnation of private property for railroad uses are appended to this brief.

Commissioners were appointed by the Hopkins County Court, who duly returned their report and appraisement of damages. Upon the filing of this report by the commissioners in the County Court, a summons was issued against and served on the Mining Company, warning it to appear in the County Court and show cause why the report of the commissioners should not be confirmed. Thereupon the Mining Company filed a petition in the County Court for the removal of the proceedings into the Circuit Court of the United States for the Western District of Kentucky on the ground of diverse citizenship. The County Court denied the petition, but approved the bond tendered by the petitioner.

The Mining Company duly filed in the United States Circuit Court for the Western District of Kentucky a complete transcript of the proceedings in the Hopkins County Court on the first day of its November term, 1903, at Owensboro.

Thereafter, on the second day of January, 1904, the Mining Company filed a bill in equity against the Traction Company, setting out the proceedings in the Hopkins County

Court, including the proceedings on its petition for removal, and alleged that the Traction Company, notwithstanding the petition for removal, intended to prosecute the proceedings in the Hopkins County Court, and complainant prayed an injunction against the Traction Company enjoining and restraining it from further prosecuting or causing to be prosecuted the proceedings in the Hopkins County Court, and from taking any steps or orders or making any motions, and from appearing in the Hopkins County Court in any way in said proceedings. Upon this bill a preliminary injunction was granted. (Bill, R., p. 1.) The Traction Company filed a demurrer to the bill, the ground of which is that the court is without jurisdiction or power to grant the injunction prayed for in the bill, or to grant any other or like relief. (R. R. 19-20.) The jurisdiction of the court below rests on the proposition that the condemnation proceedings in the Hopkins County Court are transferable directly to the Circuit Court of the United States.

The case came on for hearing on the demurrer to the bill, and the judgment of the Circuit Court was that the demurrer be overruled.

There was heard and determined at the same time a motion to remand the condemnation proceedings to the County Court, which motion was also, at the same time, overruled. (R. R. 20-21.)

The Traction Company, standing by its demurrer and failing to answer, a final decree was entered on the 26th of July, 1904, granting a perpetual injunction, as prayed for in the bill, and this appeal is from that decree. In the decree the following certificate was made by the judge of the court:

> "The court certifies and states that one issue considered and adjudged upon the demurrer to the bill of complaint

and upon the final hearing of the cause was whether the court had jurisdiction of this action, or to grant the relief prayed for by the complainant, or any part of it. The court held that it had jurisdiction to grant the relief herein adjudged, and the question of jurisdiction alone is now certified under the act of Congress to the Supreme Court of the United States for decision." (R. R. 27-28.)

Respectfully submitted,

DAVID W. FAIRLEIGH,

Counsel for Appellant.

APPENDIX.

KENTUCKY STATUTES.

CONDEMNATION OF LAND.

SECTION 835. When any company authorized to construct a railroad shall be unable to contract with the owner of any land or material necessary for its use for the purpose thereof, it shall file, in the office of the clerk of the County Court, a particular description of the land and material sought to be condemned, and may apply to the County Court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said court shall appoint three impartial housekeepers of the county who are owners of land, and who shall be sworn to faithfully and impartially discharge their duties under this law.

SEC. 836. It shall be the duty of said commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately; and they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken; but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a report, in writing, to the office of the clerk of said court, stating their award, and

shall describe, in their report, the land and material condemned, give the names of the owners, and whether non-residents of the State, infants, of unsound mind, or married women.

SEC. 837. Upon the application of said company, and upon filing such affidavits, as may be necessary, the clerk of said court shall issue process against the owners to show cause why the said report should not be confirmed, and shall make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court.

SEC. 838. At the first regular term of the County Court, after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required, it shall be the duty of the court to examine said report, and if it shall appear to be in conformity to this law, and to the extent that no exceptions have been filed thereto by either party, it shall confirm said report as against the owners not excepting.

SEC. 839. When exceptions shall be filed by either party, the court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in Section Eight Hundred and Thirty-six of this law, and, upon the request of either party, may be sent by the court, in charge of the sheriff, to view the land or material. If sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed. Either party may appeal to the Circuit Court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried *de novo*, upon the conformation of the report of the commissioners by the County Court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the County Court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the

same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the County Court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of this law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto.

SEC. 840. The appeal from the County Court shall be taken by filing with the clerk of the court to which the appeal lies a statement of the parties to the appeal, and a transcript of the orders of the County Court, and thereupon the said clerk shall certify to the clerk of the County Court that said appeal has been filed, and the clerk of the County Court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending; and if the owner on his appeal shall fail in the Circuit Court to increase the amount of damages awarded in the County Court, he shall pay all the costs of the appeal; if the damages are increased in the Circuit Court, the other party shall pay all the costs of the appeal. The same rule as to payment of costs shall apply when the appeal is prosecuted by the party seeking to condemn land.

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Supreme [redacted]

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[redacted]

THE [redacted] TRANSPORT [redacted], Appellant,

vs.

THE [redacted] RAILWAY COMPANY, Appellee.

[redacted]

[redacted]
Counsel for Appellant.

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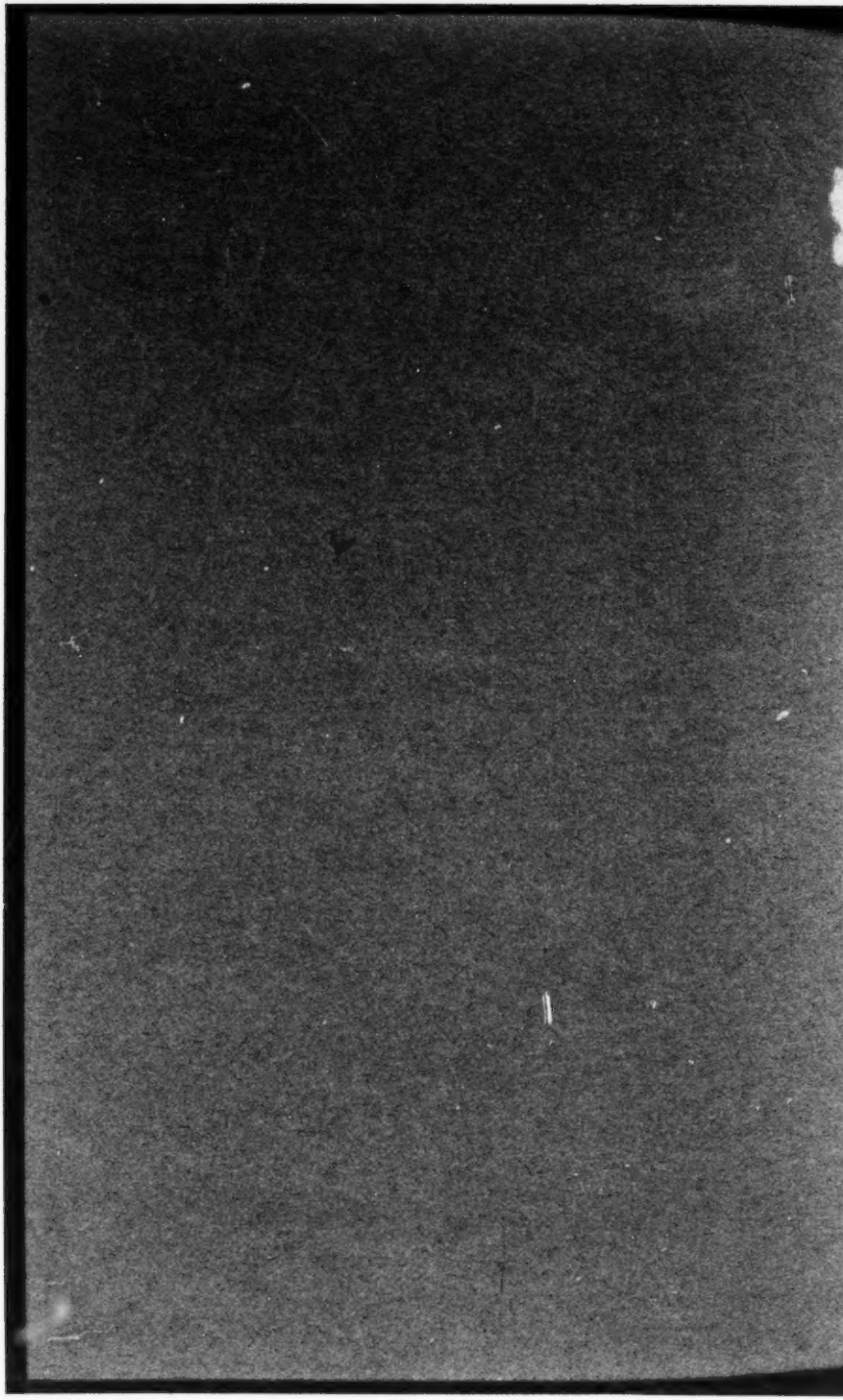

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 362.

THE MADISONVILLE TRACTION COMPANY, . . . *Appellant*,

vs.

THE SAINT BERNARD MINING COMPANY, . . . *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT.

The appellant, the Madisonville Traction Company, hereinafter called the Traction Company, is a Kentucky corporation, having corporate power to build and operate an electric railroad.

The appellee, the Saint Bernard Mining Company, hereinafter called the Mining Company, is a Delaware corporation, owning a large tract of land in Hopkins County, Kentucky, and carrying on the business of mining coal therefrom.

The projected line of railroad which the Traction Company proposes to build runs through the lands of the Mining Company, and the former company being unable to agree with the latter for the needful right of way through these lands, began condemnation proceedings in the Hopkins County Court. These proceedings were instituted in accordance with the statute laws of Ken-

tucky providing for the condemnation of private property for railroad uses, and sought to condemn a defined portion of the lands of the Mining Company as a right of way for the railroad.

The statutes of Kentucky providing for the condemnation of private property for railroad uses are in full as follows:

"SECTION 835. When any company authorized to construct a railroad shall be unable to contract with the owner of any land or material necessary for its use for the purpose thereof, it shall file, in the office of the clerk of the County Court, a particular description of the land and material sought to be condemned, and may apply to the County Court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said court shall appoint three impartial housekeepers of the county who are owners of land, and who shall be sworn to faithfully and impartially discharge their duties under this law.

"SEC. 836. It shall be the duty of said commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately; and they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken, but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a report, in writing, to the office of the clerk of said court, stating their award, and shall describe in their report the land and material condemned, give the names of the owners, and whether nonresidents of the State, infants, of unsound mind, or married women.

"SEC. 837. Upon the application of said company, and upon filing such affidavits, as may be necessary, the clerk of said court shall issue process against the owners to show cause

why the said report should not be confirmed, and shall make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court.

"SEC. 838. At the first regular term of the County Court, after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required, it shall be the duty of the court to examine said report, and if it shall appear to be in conformity to this law, and to the extent that no exceptions have been filed thereto by either party, it shall confirm said report as against the owners not excepting.

"SEC. 839. When exceptions shall be filed by either party, the court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in Section Eight Hundred and Thirty-six of this law, and, upon the request of either party, may be sent by the court, in charge of the sheriff, to view the land or material. If sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed. Either party may appeal to the Circuit Court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried *de novo*, upon the conformation of the report of the commissioners by the County Court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the County Court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the

purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the County Court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of this law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto.

"SEC. 840. The appeal from the County Court shall be taken by filing with the clerk of the court to which the appeal lies, a statement of the parties to the appeal, and a transcript of the orders of the County Court, and thereupon the said clerk shall certify to the clerk of the County Court that said appeal has been filed, and the clerk of the County Court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending; and if the owner on his appeal shall fail in the Circuit Court to increase the amount of damages awarded in the County Court, he shall pay all the costs of the appeal; if the damages are increased in the Circuit Court, the other party shall pay all the costs of the appeal. The same rule as to payment of costs shall apply when the appeal is prosecuted by the party seeking to condemn land." (Ky. Statutes, Secs. 835 to 840, inclusive).

Following the provisions of this statute, Commissioners were appointed by the Hopkins County Court, who duly returned their report and appraisement of damages in writing. Process was issued and served on the Mining Company to show cause why the report of the Commissioners should not be confirmed. Thereupon the Mining Company filed a petition in the County Court for the removal of the proceedings into the Circuit Court of the United States for the Western District of Kentucky on the ground of diverse citizenship. The County Court denied the petition on the ground that the proceedings are not removable. The

Mining Company thereafter duly filed in the United States Circuit Court for the Western District of Kentucky a complete transcript of the proceedings in the Hopkins County Court. Fearing that the Traction Company would prosecute the proceedings in the Hopkins County Court, notwithstanding the petition for removal had been filed therein, and notwithstanding the transcript of the proceedings had been filed in the United States Circuit Court, the Mining Company, on the 2nd day of January, 1904, filed a bill in equity in the Circuit Court of the United States for the Western District of Kentucky against the Traction Company, praying an injunction against the latter company to restrain it from further prosecuting the proceedings in the Hopkins County Court.

The bill set out the proceedings in the County Court, including the orders of the court on the petition of the Mining Company for removal, and alleged that the Mining Company had duly filed a complete transcript of the proceedings in the United States Circuit Court, and alleged further that, notwithstanding these facts, the Traction Company intends to, and will, unless enjoined therefrom, prosecute the proceedings in the County Court. (Bill, R. pp. 1, 2, 3, 4, 5.)

Upon this bill a preliminary order of injunction was granted on the 6th day of January, 1904. (R., p. 18.)

The Traction Company filed a demurrer to the bill, on the ground that the United States Circuit Court has no jurisdiction or power to grant the injunction prayed for in the bill, or to grant any other or like relief. (R., pp. 19, 20.)

The case came on for hearing on the demurrer to the bill, and the demurrer was overruled. There was heard and decided at the same time a motion made by the Traction Company to remand the condemnation proceedings to the County Court, which motion was also, at the same time, overruled. (R.. pp. 20, 21.)

The court delivered a written opinion overruling the demurrer, and made a part of it, by reference, the opinion delivered overruling the motion to remand the condemnation proceedings to the County Court. (R., pp. 21 to 27 inclusive.)

The Traction Company, standing by its demurrer, and failing to answer, a final decree was entered on the 26th of July, 1904, granting a perpetual injunction against the Traction Company as prayed for in the bill. (Decree, R., pp. 27, 28.)

The Judge of the Circuit Court certified the question of jurisdiction to this court for decision.

From that decree this appeal is prosecuted.

Specification of Errors.

1. The condemnation proceedings were not transferable from the Hopkins County Court to the United States Circuit Court, and, therefore, the latter court never had any jurisdiction thereof, and the proceedings, should have been remanded to the Hopkins County Court.

2. The jurisdiction of the United States Circuit Court to grant any relief in this suit is bottomed on its jurisdiction of the condemnation proceedings, and being without any jurisdiction of the condemnation proceedings it had no jurisdiction whatever of this suit.

3. In any event the United States Circuit Court had no jurisdiction to enjoin proceedings in the Hopkins County Court, because the Act of Congress (U. S. Revised Statutes, Sec. 720) prohibits Courts of the United States from granting any writ of injunction to stay proceedings in any State Court, except in cases where such injunction may be authorized in proceedings in bankruptcy.

ARGUMENT.

I

Condemnation proceedings, prior to the Act of 1887, were sometimes transferable from the State Court in which they were pending into the Circuit Court of the United States. When

the proceedings in the State Court reached the point where nothing remained to be done but to inquire into and adjudge *the amount of damages*, then they became, *at that time*, a transferable controversy, and not before. Such seems to be the rule deducible from the decisions of this court. The rule rests upon the proposition, that the right of *eminent domain* is a sovereign prerogative inherent in the State government, and in the exercise of that sovereign prerogative, whether the proceeding is directly in the name of the State or in the name of a grantee of the State; no other sovereignty, by any of its departments, has the power to interfere. This rule is necessary to the preservation of the constitutional sovereignty of the State as a separate governmental entity.

The question first arose in this court in the case of *Boom Company vs Patterson*, *98 U. S.*, *403*. There the court said, Mr. Justice Field delivering the opinion:

> "The position of the Company on this head of jurisdiction is this: that the proceedings to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public use, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by

them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties—the owners of the land on the one side, and the company seeking the appropriation on the other—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words the value of the property taken. No other question was open to contestation in the District Court. Turner vs. Halloran, 11 Minn., 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and a citizen of another State, can not be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

In Searl vs. School District No. 2, 124 U. S., 197, this court held that condemnation proceedings commenced in a County

Court of Colorado by a School District to condemn lands for public school purposes were transferable to the Circuit Court of the United States. This was held under the peculiar statutes of Colorado. The court, however, approved the doctrine of Boom Company vs. Patterson.

The two cases above referred to are the only cases, so far as we have been able to discover, involving directly the question whether condemnation proceedings are transferable from a State to a Federal Court.

A cognate question arising out of the assessment of property for taxation was decided by this court in Upshur County vs. Rich, 135 U. S., 467. There Mr. Justice Bradley, who delivered the opinion of the court, after reviewing all of the authorities, including Boom Company vs. Patterson, said:

> "The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and can not, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit, but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.
>
> "Applying this principle to the facts of the present case, it does not seem difficult to come to a decision. We have seen that, although the appeal from the assessment was made to the 'County Court' *eo nomine*, yet that this is not a judicial body, invested with judicial functions, except in matters of probate, but is the executive or administrative board of the county, charged with the management of its financial and

executive affairs. According to the principles laid down by the State Court, the acts of this board, in matters of taxation, are as purely administrative as are those of the county assessors in making the original assessment. Although we are not concluded by this decision, it is so much in harmony with our own decisions on the same subject that we accept it as correct."

Under the Constitution and laws of Kentucky, condemnation proceedings in the County Court are the initial administrative proceedings wherein the determination whether the property shall or or shall not be appropriated—whether the sovereign prerogative of the State shall be exercised with respect of the particular appropriation proposed by the proceedings—and, as a necessary incident, an assessment of damages is made, preliminarily, to determine the amount which shall be paid to the owner of the property before the actual taking.

Section 242 of the Constitution of Kentucky is as follows:

"Municipal and other coporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual, made by commissioners or otherwise; and upon appeal from such preliminary assessment the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

This provision of the Constitution contemplates a determination of the question whether the appropriation shall be made involved in which is a preliminary assessment of damages, the

amount of which assessment shall be paid before the property is taken; and this section of the Constitution further provides that appeals shall be allowed from such preliminary assessment of damages, and that upon such appeals the amount of damages shall "be determined by a jury according to the course of the common law."

The condemnation statutes of Kentucky were passed in accordance with this constitutional provision. These statutes have been quoted in full in this brief, and their provisions may be thus summarized:

1. That any company authorized to construct a railroad which shall be unable to contract with the owner of land necessary for the uses of the railroad company, shall file in the office of the Clerk of the County Court a particular description of the land sought to be condemned, and ask the County Court to appoint three commissioners to view the land and report, in writing, the damages which will result to the owner of the land from the proposed appropriation.

2. That these commissioners shall, after being sworn, view the land and report their award in writing to the County Court, stating therein the names of the owners of the land.

3. That the railroad company, upon the filing of the commissioners' report, may cause process to be issued against the landowners requiring them to show cause why the report of the commissioners should not be confirmed.

4. If the owners of the land shall file exceptions to the report of the commissioners, the County Court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions.

5. At the end of the proceedings in the County Court, whether the end comes from a confirmation of the report of the commissioners, or whether it comes after a jury has returned a verdict upon the questions of fact raised by the exceptions, the railroad company is empowered to take possession of the land and proceed with its work, upon paying to the landowner the damages ascer-

tained by the proceedings and all costs adjudged to the owner, and this right exists notwithstanding the landowner shall take and prosecute an appeal.

6. That either party may appeal to the Circuit Court of the County, where a trial shall be had *de novo*, and if the landowner appeals, and upon a trial in the Circuit Court the amount of damages there awarded are not greater than the amount awarded in the County Court, he shall pay all the costs of the appeal.

The general jurisdiction of County Courts in Kentucky is almost purely administrative. That jurisdiction relates to the probate of wills, the granting of letters of administration, the appointment of guardians, trustees, committees, curators and other fiduciaries, the granting of tavern, drug and liquor licenses, etc. The general jurisdiction of County Courts is defined by Section 1057 of the Kentucky Statutes, which is as follows:

> "The County Court shall have jurisdiction to probate wills, appoint and remove personal representatives, guardians, trustees, committees, curators and other fiduciaries, to grant tavern, drug and liquor licenses, and such other jurisdiction as may be conferred upon it by law."

It is provided by the condemnation statutes that this administrative court shall determine whether appropriations of private property to railroad uses shall be made, and preliminarily determine the damages to which the owner of the property shall be entitled. It is of no importance that the statute authorizes the empaneling of a jury in that court, for the jury is merely adjunctive.

The right to take the property is determined in the County Court, and all costs in that court, both of the landowner and of the railroad company, are to be paid by the railroad company. On the appeal to the Circuit Court, however, it is provided as in ordinary litigation between parties, that the unsuccessful party shall pay all costs.

Wherefore, it is certain that under the Constitution and laws of Kentucky the proceedings in the County Court to condemn

land for railroad uses are the steps whereby the State exercises its sovereign power of *eminent domain*. No other government or sovereignty has the power to interfere with the exercise by the State of that governmental power, by preventing the grantee of the State from taking these preliminary steps in the County Court. When the State accomplishes its purpose, and, through the machinery created by its Constitution and laws, shall have determined whether the appropriation of the private property to the public use shall or shall not be made, then a controversy may arise which is susceptible of transfer to a Federal Court. Such a controversy can not arise until an appeal shall have been taken to the Circuit Court of the County, after the machinery which the State has provided for carrying out its sovereign right of *eminent domain* shall have performed its functions.

This appeal is from the preliminary assessment of damages, and in the language of the Constitution, upon the appeal "the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

This common law controversy in the Circuit Court of the County is a controversy which, under the judiciary act of 1875, was transferable to the United States Circuit Court. If the railroad company appealed to the Circuit Court of the County, the landowner might in that court file a petition for removal, or on the other hand, the landowner might appeal to the Circuit Court of the County, and there file his petition for removal. It is true that the statute provides that the trial in the Circuit Court shall be *de novo*, but it is obvious that the statute did not intend to give to the Circuit Court any other jurisdiction than to determine *de novo* the question of damages, for, the statute provides, that the railroad company shall have the right at the conclusion of the proceedings in the County Court and upon the payment to the landowner of the damages assessed and the costs of the proceedings, to enter upon the land and proceed with its work; and further, the County Court is empowered to make appropriate orders for the conveyance of the land to the railroad company, and all this notwithstanding the appeal to the Circuit Court. The

award of damages made by the County Court, and the payment thereof to the landowner, satisfies the provision of the Constitution that just compensation shall be paid to the property owner before his property shall be taken for public uses. If the landowner, upon the appeal, should be awarded a greater amount in damages than the amount awarded in the County Court, such excess, no doubt, would be a lien on the land taken by the railroad company.

The Court of Appeals of Kentucky has not, so far as we have been able to discover, construed this statute with respect of the extent of the jurisdiction of the Circuit Court of the County on appeals in condemnation proceedings.

That court considered two cases arising before the adoption of the present Constitution, and before the passage of the present condemnation statutes, which seem to involve the question whether the Circuit Court, under the then existing laws, had the jurisdiction to determine the *right* to condemn.

The first case is that of *Tracy, &c., vs. Elizabethtown, Lexington & Big Sandy Railroad Company, 80 Ky. 259.* In that case the right of condemnation and the method of proceeding were provided in the charter of the railroad company, which was granted by special Act of the legislature. By this special Act of the legislature, as appears from the opinion, the proceedings were to be begun by the issuance of a warrant by a Justice of the Peace, on the application of the railroad company, directed to the sheriff of the County, authorizing and directing the sheriff to summon a jury and hold an inquest as to the damages, and the verdict was to be returned to the Circuit Court, and in that court be subject to exceptions and judgment.

The second case is *Portland & Greenwood Turnpike Company vs. Bobb, 88 Ky., 226.* The proceedings there were had under a general condemnation statute, the provisions of which are substantially the same as those of the present condemnation statutes. (General Statutes, Chap. 18—the present compilation of statutes, passed since the adoption of the present Constitution and which superseded the General Statutes, is called Kentucky Statutes.)

It is difficult to determine from the opinion in that case precisely what questions were involved, or how they arose. It seems, however, that the only matter decided was, that in the statement to be filed in the County Court by the party asking the condemnation, it is necessary to aver an effort and failure to agree with the owner of the property, and that the property sought to be condemned is necessary to the uses for which the condemnation is sought. That these are jurisdictional facts and unless averred in the statement the County Court is wholly without jurisdiction. It is further decided in the opinion that the statement can not be amended in the Circuit Court, although the proceedings are there to be tried *de novo*.

But whether the Circuit Court on the appeal from the County Court has jurisdiction to determine the *right* to condemn, as well as the amount of damages, seems to us not decisive of the question at bar. Whatever may be the jurisdiction of the Circuit Court on an appeal, is is certain that the proceedings in the County Court determine originally and preliminarily the right to appropriate the property, and this preliminary determination is not stayed by the appeal to the Circuit Court, but notwithstanding the appeal the party seeking the condemnation may enter upon the property and proceed with the construction of the public work. The governmental function of the State is ended in that proceeding, and the appeal in the Circuit Court proceeds *inter partes*.

We submit that under the Constitution and laws of Kentucky, condemnation proceedings instituted by a railroad company in the County Court could not be transferred from that court into the Circuit Court of the United States even under the judiciary Act of 1875.

II.

The cases of Boom Company vs. Patterson, 98 U. S., 404, and Searl vs. School District No. 2, 124 U. S., 197, were decided under the Act of Congress of 1875. Since the decision of those cases, the Congress has passed the Act of 1887, amended by the

Act of 1888. There is a marked difference between the provisions of the Act of 1875, and the Acts of 1887 and 1888 with respect of the removal of suits from State Courts into the Circuit Court of the United States.

The Act of 1875 defines the original jurisdiction of Circuit Courts of the United States.

After thus defining the original jurisdiction of the Circuit Courts, the Act defines what suits commenced in a State Court may, on the petition of the defendant, be removed from a State Court into a Circuit Court of the United States. Suits that may be thus removed are independently defined, without any reference to that part of the Act creating the *original* jurisdiction of the Circuit Courts wherefore it came about that certain suits of which the Circuit Courts of the United States did not have original jurisdiction, that is to say which the plaintiff could not have brought originally in the Circuit Court of the United States, might, nevertheless, when brought in a State Court be removed into the Circuit Court of the United States on the petition of the defendant. The jurisdiction of the Circuit Courts on removal was not limited to their original jurisdiction. Thus, the Circuit Courts, by an express provision of the Act, did not have jurisdiction of a suit by an assignee to recover the contents of a promissory note or other chose in action unless the suit might have been prosecuted in the Circuit Court if no assignment had been made; yet, where the assignee brought such a suit in a State Court, the defendant might remove the case from the State Court to the Circuit Court of the United States, notwithstanding the fact that the latter court had no original jurisdiction of the suit. *Claflin vs. Commonwealth Insurance Company, 110 U. S., 81; Delaware County vs Diebold Safe Company, 133 U. S., 473.*

But the Act of March 3, 1887, as amended by the Act of August 13, 1888, expressly confines the right to remove a suit from a State Court into a Circuit Court of the United States to suits of which the latter court has *original* jurisdiction. The Acts of 1887-1888 define the jurisdiction of the Circuit Courts. After

doing this they do not, as did the Act of 1875, define independently what suits may be removed from State Courts to the Circuit Courts of the United States, but expressly confine the right of removal to suits of which, under the Act, the Circuit Courts have original jurisdiction. Following is the provision :

> "That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district.
>
> "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

The difference in this respect between the Act of 1875 and the Acts of 1887-1888 has been considered by this court in at least two cases:

In Tennessee vs Union & Planters Bank, 152 U. S., 454, Mr. Justice Gray, delivering the opinion of the court after stating that, even under the act of 1875 where the original jurisdiction of a Circuit Court of the United States is invoked on the sole ground that the determination of the suit depends on a Federal question, the declaration or bill must disclose that fact, said:

> "The same rule applies, more comprehensively, to the Acts of 1887 and 1888. In Section 1, as thereby amended, the

words giving original cognizance to the Circuit Courts of the United States in this class of cases are the same as in the Act of 1875 (except that the jurisdictional amount is fixed at $2,000) and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the Constitution or laws of the United States. But the corresponding clause in Section 2 allows removals from a State Court to be made only by defendants, and of suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section, 24 Stat., 553; 25 Stat., 434. The change is in accordance with the general policy of these Acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States. Smith vs. Lyon, 133 U. S., 315, 320; *In re* Pennsylvania Company, 137 U. S., 451, 454; Fisk vs. Henarie, 142 U. S., 459, 467; Shaw vs. Quincy Mining Company, 145 U. S., 444, 449; Martin vs. Baltimore & Ohio Railroad, 151 U. S., 673,687."

In Mexican National Railroad Company vs. Davidson, 157 U. S., 201, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"By the second section of the Act of March 3, 1875, C. 137, 18 [Stat. 470, the exception out of the original jurisdiction as to assignees of choses in action occupied the same relative position as in the Act of 1789, and the same conclusion was reached in regard to it, namely, that the restriction upon the commencement of suits contained in Section 1 did not apply to the removal of suits under Section 2. Claflin vs. Commonwealth Insurance Co., 110 U. S., 81; Delaware County vs. Diebold Safe Co., 133 U. S., 473. And see Goldey vs. Morning News, 156 U. S., 518.

"But the second section of the Act of 1887 (as corrected in 1888) contained a radical difference from Section 12 of the Act of 1789 and Section 2 of the Act of 1875 in confining the suits which might be removed to those 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section.' As already stated, the last part of the preceding section provides that no Circuit or District Court shall have cognizance to recover the contents of a chose in action in favor of an assignee, unless such suit might have been prosecuted therein to recover such contents if no assignment had been made, while the second section provides for the removal of suits now pending, or which may be hereafter brought in any State Court, of which the Circuit Courts of the United States were given jurisdiction by the first section. This change was made in accordance with that intention to restrict the jurisdiction of the Circuit Courts, which has been so often recognized by this court. Smith vs. Lyon, 133 U. S., 315, 319; *In re* Pennsylvania Company, 137 U. S., 451, 454; Fisk vs. Henarie, 142 U. S., 459, 467; Shaw vs. Quincy Mining Company, 145 U. S., 444; Hanrick vs. Hanrick, 153 U. S., 192.

"We must hold, therefore, as has indeed already been ruled, Tennessee vs. Union & Planters' Bank, 152 U. S., 454, 461, that the jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such and can not be waived. Capron vs. Van Noorden, 2 Cranch, 126; Mansfield Railway Company vs. Swan, 111 U. S., 379; Metcalf vs. Watertown, 128 U. S., 586. It is true that by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of the residence of the plaintiff or the defendant,' and this restriction is a personal privilege of the defendant, and may be waived by him. St. Louis & San Francisco Railway vs.

McBride, 141 U. S., 127. Section 2, however, refers to the first part of Section 1 by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. McCormick Machine Co. vs. Walthers, 134 U. S., 41."

This court has, therefore, held that the jurisdiction of the United States Circuit Courts on removal is limited to suits of which they have *original* jurisdiction.

Have the Circuit Courts of the United States original jurisdiction of condemnation proceedings under State statutes in cases where the party seeking to condemn and the owner of the property sought to be condemned are citizens of different States? This question, we respectfully submit, must be answered in the negative.

The right of *eminent domain* is distinctly and exclusively an attribute of government—of sovereignty. This court said in *Kohl, et al., vs. United States, 91 U. S. 371:*

> "No one doubts the existence in State governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity, and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk, lib. 2, c. 15; Kent's Com. 338, 340; Cooley on Const. Lim., 584, *et seq.*"

Such being the undisputed nature of the right of *eminent domain*, an essential attribute of the right must be the subsidiary right in the State government itself to exercise the original gov-

ernmental right in its own way subject only to such limitations as may be imposed by its fundamental law. Otherwise the right itself might be subverted or destroyed. The State government, by its legislative department, has provided how, and in what cases, the right shall be exercised for the benefit of various public services supplied by private corporations. The right is exercised exclusively under a grant from the government, and the very terms and conditions of the grant are that it shall be exercised in a particular way. Without the grant from government, no person or corporation, although engaged in furnishing a public service, could employ the right of eminent domain, however necessary to the public use the private property of the citizen might be. A condition of the grant is that the right shall be exercised in a certain way. A particular functionary—in this case a County Court—is given initial jurisdiction. Under the conditions of the grant no other functionary or court can exercise the jurisdiction.

This particular question was decided by the Circuit Court of the United States for the District of Connecticut in *Hartford, &c., W. R. Co. vs. Montague, 94 Fed. Rep., 227.* There it was decided that condemnation proceedings under the laws of Connecticut can not be brought originally in the Circuit Court of the United States, and that, therefore, such proceedings are not removable into the Circuit Court of the United States.

To hold that the initial steps in condemnation proceedings are transferable to the Federal Courts, or that the Federal Courts have jurisdiction of such initial steps would impair the right of condemnation to such an extent as to render it practically worthless. The sessions of the Circuit Courts of the United States are infrequent, the Circuit Court of the United States for the Western District of Kentucky having two sessions a year at Owensboro. The Kentucky condemnation statute provides that the railroad company may file a statement in the County Clerk's office, and at once apply to the County Court to appoint commissioners. The commissioners are at once empowered to enter upon their

duties. When their report is returned a process to show cause issues against the landowner returnable to the next regular term of the County Court. That court holds a regular term once in each month. If exceptions to the report are filed, it is made the duty of the court forthwith to empanel a jury to try the issues of fact made by the exceptions. The necessities of the case require this expedition. Great and costly public works may await the final result of the proceedings in the County Court. No appeal to any court is allowed to prevent the taking of the property under the proceedings in the County Court.

In the case at bar the whole project has been suspended by the injunction granted by the court below.

We submit that the Circuit Court of the United States did not have original jurisdiction of the condemnation proceedings, and on that ground the proceedings were not removable from the Hopkins County Court.

III.

The injunction granted by the court below in the final decree is as follows:

> "It is therefore accordingly ordered, adjudged and decreed by the court that the defendant Madisonville Traction Company, its officers, agents and employes and each of them, be and they are perpetually enjoined and restrained from further prosecuting or causing to be prosecuted in the Hopkins County Court, the proceeding described in the bill of complaint, and which was instituted by the said defendant against the said complainant in the Hopkins County Court, and from taking any steps therein, in said County Court, or causing any orders to be made by said County Court in said proceeding or taking any proceeding whatever therein in said County Court, and from entering upon the land described in said proceeding or any part thereof, under any order of said County Court in said proceeding." (R., page 27.)

This injunction is in the very teeth of the Act of Congress—U. S. Revised Statutes, Sec. 720—which is as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

No doubt that the United States Circuit Court would have the power, in the protection of its jurisdiction, to declare any judgment rendered by the Hopkins County Court void which might have been rendered after the transfer of the proceedings to the Federal Court, and to enjoin the Traction Company from taking any steps to enforce the judgment, and from entering on the lands under the judgment. This power would be absolutely necessary to the jurisdiction of the Federal Courts. But the injunction in the case at bar restrains the prosecution of the proceedings to judgment, or taking any steps whatever to reach a judgment in the County Court. This, we submit, is prohibited by the Act of Congress. We content ourselves with the mere citation of cases decided by this court which the court below regarded as supportive of the jurisdiction to grant such an injunction. An analysis of these cases will show that the only jurisdiction is to grant an injunction against the enforcement of a judgment rendered in a State Court after the jurisdiction in the same controversy in which the State Court judgment was rendered had in some way attached in the Federal Court. If the suit or proceedings in the State Court is merely a method of enforcing a judgment of the State Court, which judgment is void because rendered after the jurisdiction of the Federal Court attached then the suit or proceedings may be enjoined by the Federal Court, because such an injunction is nothing more than restraining the *enforcement* of the void judgment. But it is altogether a different thing to enjoin, in the first instance, the taking of any steps in the State Court looking to the rendition of a judgment in the original suit. The rule is that a Federal Court has the power by

injunction to prevent the execution of a judgment of a State Court rendered in defiance of the jurisdiction of such Federal Court. Certainly where property is in the actual or constructive possession of a Federal Court, that court may protect its possession by any sort of injunction that may be necessary for that purpose.

The cases heretofore decided by this court, and relied on in the opinion of the court below to support the decree, do not, we submit, have that effect. These cases are French vs. Hay, 22 Wallace, 231; Moran vs. Sturgis, 154 U. S., 269; Dietzsh vs. Huidekoper, 103 U. S., 494; and Kern vs. Huidekoper, 103 U. S. 483.

We respectfully ask that the decree be reversed with directions to dismiss the bill.

DAVID W. FAIRLEIGH,
Counsel for Appellant.

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Dietzsch vs. Huidekoper, 103 U. S. 494.
Kern vs. Huidekoper, 103 U. S. 483.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 362.

THE MADISONVILLE TRACTION COMPANY, - - Appellant,

vs.

THE SAINT BERNARD MINING COMPANY, - - - Appellee.

BRIEF FOR APPELLEE.

E. C. SEBREE,
Counsel for Appellee.

GORDON & GORDON & COX,
C. J. WADDILL,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 362.

THE MADISONVILLE TRACTION CO., . *Appellant.*

vs.

THE SAINT BERNARD MINING CO., . . *Appellee.*

BRIEF FOR APPELLEE.

OBJECTION TO APPELLANTS STATEMENT OF CASE.

Counsel for appellant in his statement of the case (Brief, p. 1), makes the mistake of assuming that the allegations made in the application to the County Court (R., p. 13), are taken for confessed when, as a matter of fact, the bill denies these allegations and states that it was not brought in good faith. (R., p. 4, 11, p. 2.)

Taking these denials and putting them in the form of affirmative allegations the bill in substance alleges that when it commenced the condemnation proceedings The Madisonville Traction Company was not authorized to build a railroad; that the land sought to be condemned was not necessary for its right of way, and it was not unable to contract with the owners of the land.

STATEMENT.

The Madisonville Traction Company by a proceeding in the Hopkins County Court, hereinafter called the Traction Case, sought to condemn to its use certain land of the St. Bernard Mining Company. The latter company at the proper time filed the proper petition and bond for removal, and removed same as provided by the United States Statutes to the United States Circuit Court for the Western District of Kentucky.

Notwithstanding the removal The Traction Company and the officers of the County Court continued to prosecute and adjudicate said suit. Whereupon the Mining Company filed its bill in equity, praying that the United States Circuit Court enjoin any further prosecution in the County Court of the suit that had been removed and was then pending before said Circuit Court. To this bill the defendant demurred. The court overruled the demurrer and ordered an injunction *pendente lite* upon motion of plaintiff. (R., p. 20.)

Afterward, upon motion of defendants counsel the cause was submitted and judgment rendered. From which this appeal is prosecuted. (R., p. 28).

The court certifies that only one issue was considered in thic injunction suit, The Saint Bernard Mining Company vs. The Madisonville Traction Company it being "whether the court had jurisdiction of this action or to grant the relief prayed for by complainant or any part of it." (R., p. 28.)

ARGUMENT.

I.

We submit that the question of jurisdiction thus raised has no connection with or dependence upon the question whether or not the United States Circuit Court had jurisdiction in the Traction Case. For the latter question could only be raised by direct proceedings in that case.

It has been well settled that notwithstanding the prohibition of the Act of Congress (U. S. Rev. Stat. Sec. 720), a United States Court has a right to enjoin a State Court from interfering with its orders and decrees. *French vs. Hay, 22 Wall., 253; Dietzsch vs. Huidekoper, 103 U. S., 494.*

Mr. Justice Swayne in delivering this opinion of the court in French vs. Hay says:

> "The order of the court below annulling the decree upon which the suit at law in Pennsylvania was founded was fatal to that action and entitled Hoy to a perpetual injunction without reference to the final result of the prior case."

It will be observed that at the time the injunction was granted the "prior case" referred to was still pending.

In *Dietzsch vs. Huidekoper*, Mr. Justice Wood in delivering the opinion of the court says:

> "The court has the right to enforce the judgment against the party defendant and those

whom he represents no matter how or when they may attempt to evade it or escape its effect unless by direct proceedings."

In *Wagner vs. Draket and others, 31 Fed. Rep., 849, District Court S. D. Iowa*, the court deduces from the above decisions the conclusion that when a case is removed to the United States Circuit Court that court has a right to enjoin any further prosecution of it in the State Court, Love J. says: "When a cause is legally removed to a Federal Court all jurisdiction in the State Court is at an end. . . . "No case any longer exists in the State Court." . . . An injunction in such case by the Federal Court restraining the parties before it from proceeding elsewhere is no injunction within the spirit and intent of the statute . . . because after removal there is no proceeding left in the State Court and no jurisdiction to be interfered with." "The United States Supreme Court in *Kern vs. Huidekoper, 103 U. S., 485* decided after the filing in the Circuit Court in a removal case of the record of the proceedings in the State Court, the latter lost all jurisdiction over the case, and being without jurisdiction its subsequent proceedings and judgments are not as some of the courts have ruled simply erroneous but absolutely void.

"In *Insurance Co. vs. Dunn, 19 Wall., 214*, the court says that the Act of Congress providing in such cases that upon proper petition and bond being filed the State Court 'shall proceed no further in the suit,' the further proceedings in the State Court was a clear case of usurped jurisdiction." In *Virginia vs. Rives* the court says that "all proceedings

in the State Court subsequent to the removal are *coram nonjudice* and absolutely void." . . .

"The foregoing decisions leave no doubt whatever of the power of this court to grant injunctions in cases which have been regularly removed from the State Courts."

The conclusion may be fairly drawn from these decisions that when the officers of the County Court after the removal of the Traction case continued to act in it, in the face of the statute providing in such cases the State "shall proceed no further in the suit," they become mere intermeddlers, no longer constituting a court within the meaning of Section 720, and the Circuit Court to which the case had been removed had the right to enjoin any further action in the matter.

II.

As the question of jurisdiction in the Traction case is referred to by the court below and the claim is earnestly urged by counsel for appellants that it affects the question of jurisdiction in this case, it will now be argued.

It is contended that the United States Statutes as amended by Acts of 1887 and 1888 so changed the Act of 1875 as to affect the right of removal in the Traction case and *Hartford & C. W. R. Co. vs. Montague* 92 *Fed. Rep.*, 227 (Circuit Court District Connecticut, May 9, 1891), is cited.

The court in that decision whilst it quoted the Boom case and Searl vs. School District, and expressed the opinion that those cases would not have been so

decided had the amendments of 1887 and 1888 been in force based its decision on the ground that the condemnation proceedings under consideration were different from those passed on in the cases quoted.

In fact the court in both of those cases decided that the condemnation proceedings under advisement each constituted a suit within the meaning of the statute. And it will be noted that the word suit in second section of the present law taken in connection with the first section (R., p. 24) has the same meaning in fixing jurisdiction that it had before the amendments.

III.

It is contended further by counsel for appellant that although some condemnation proceedings might be removed the one under advisement could not be until after an appeal from the County Court to the State Circuit Court, and bases his reasoning on the assumption that the County Court could only act in a purely administrative capacity. The reason would be sound if the assumption were true; but Upshur County vs. Rich cited on page nine of brief does not support this contention but only decides that in taxation proceedings under the laws of West Virginia the County Courts of that state had only administrative jurisdiction.

The section of the constitution of Kentucky cited on page thirteen of brief does not help this contention, for while it provides as a protection to the land owner, that when the case is appealed to the State Circuit Court "the amount of such damages shall be deter-

mined by a jury according to the course of the common law" it does not forbid the legislature to provide for such proceedings before an appeal is taken.

The County Courts of Kentucky act in a capacity sometimes administrative and sometimes judicial as may be prescribed by statute. The Kentucky Statutes Section 1057, gives County Courts jurisdiction over various subjects and in addition "such other jurisdictions as may be conferred by law." That the law has conferred on the County Courts the right to act judicially in condemnation proceedings, will be seen by reference to a decision of the Kentucky Court of Appeals, *Portland & Greenwood Turnpike Co. vs. Robb, 88 Ky., 230*, wherein the court construing a section of the law identical with Section 835 quoted on page two of appellants brief, decides that the necessity of the land sought to be condemned and inability to contract are conditions precedent to the exercise of the right of eminent domain, and further, incidentally, that the County Court is the court of original jurisdiction. Judge Holt in delivering the opinion of the court says:

> "They are judicial facts and should therefore be stated at the out-set. 'They are at the foundation of the proceedings.'" . . .

If these facts should have been stated it follows that they could have been controverted, and therefore judicially determined at the out-set. Hence the court refused to allow these facts to be brought before the Circuit Court on appeal because they had not been alleged before the County Court.

A suit is removable from a state to a United States Circuit Court when the amount in controversy exceeds two thousand dollars; when the suit is of civil nature; and when the defendant is a resident of another state, as provided in supplement to Revised Statues (U. S.) page 611.

In this suit and in the suit of the Madisonville Traction Company against the Saint Bernard Mining Company it is alleged that the latter is a citizen of another state and that the amount in controversy is more than two thousand dollars. This leaves the only question now to be considered whether or not the condemnation proceedings in the Hopkins County Court constituted such a suit of a civil nature as contemplated by the statute above referred to.

It is contended by counsel for appellant that said proceedings could not be removed until after an appeal to the Circuit Court, because to do so would be an interference with the exercise of eminent domain. And they cite in support of this view, 89 U. S., 403 and 124 U. S., 197. We submit that the former is not point; and the reasons given in, neither support such contention. In the case of *Mississippi and Rum River Boom Company* vs. *Patterson*, *89 U. S.*, page 403, the plaintiff was authorized by special act to enter upon and occupy any land necessary for properly conducting its business and where such land was private property to apply to the District Court of County in which it is situated for appointment of Commissioners to appraise its value; and take proceedings for its condemnation; a right of appeal being given to any party interested to District Court.

Upon appeal being taken the case was removed to the United States Circuit Court by authority of a Federal Statute similar to the act now in affect except as to limitation of amount involved.

No question was raised in the District Court except that of compensation and the principle upon which same should be assessed; but the United States Supreme Court where the case taken on writ of error, the question of the jurisdiction of the United States Circuit Court was raised.

It will be observed that in this case the Boom Company was authorized to take the land and no provision was made for judicial inquiry until after appeal to District Court; whereas under our Statute a railroad company can not take land until the County Court has decided that proceedings conform to the law, (Sec. 838 Ky. Statutes,) and not then if exceptions be filed until a trial by jury is had.

The court in the Boom Company case decided that the suit was properly removed because no judicial proceedings were provided for until after appeal to District Court. And decided further that such was not in derogation of the right of eminent domain. And that the right of removal existed where a controversy was raised involving a judicial question.

Mr. Justice Field, in delivering the opinion of the court in discussing the right of eminent domain says:

> "But not withstanding the right is one that appertains to sovereignty when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance."

And in conclusion he says:

> "*And in Gaines vs. Fuentes, 92 U. S. 20*, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pencuniary estimation is the subject of litigation."

The suit of *Union Pacific R. Co. vs. City of Kansas, 115 U. S., 1–25*, was brought to the Supreme Court by the City of Kansas by writ of error to the Circuit Court of the United States for the Western District of Missouri. The City of Kansas commenced condemnation proceedings for widening a street. A trial was had before the Mayor and a jury, and the case was appealed to the Circuit Court of Jackson County, Missouri, before motion was made for removal. The city claimed this was too late. The court decided that it was properly removable because motion was made the first time a judicial question could be raised.

Mr. Justice Bradley in delivering the opinion quotes the Boom case with approval of the decision, and the reason therefor, viz.: *that no removal could be had until a judicial question could be raised.*

Searl vs. School District, 124 U. S. 197 is another case quoted by opposing counsel.

The School District sought to condemn land for school purposes. The Colorado Statutes provide for condemning land by filing petition before County Court or District Court, the judge of which to appoint three commissioners to assess damages. Upon demand of any defendant, a jury of six free

holders to be summoned to fix damages. All of the other proceedings under the Colorado law are almost identical with those under Kentucky statutes except that the latter provide for an appeal to Circuit Court, and the former, only to Supreme Court.

From these decisions it may fairly be concluded that where the other conditions prescribed by the Federal Statutes exist, any action is removable in which a judicial question is pending before a State Court authorized to exercise judicial function in such action.

The Kentucky Statutes provide that a company *authorized to construct a railroad unable* to contract for *necessary* material or *land* may file with the County Clerk a description of property to be taken. And upon application to County Court it shall appoint three commissioners to assess damages. Section 836 provides for commissioners filing report in County Court Clerks office. Section 837 provides that the clerk shall issue process against owners to *show cause*, and to make such orders as to non-residents etc., as provided by Code, for practice in Circuit Court. Section 838 provides that at first term of County Court after owners have been served with process time prescribed by Code before answer is required, it shall be the *duty* of the *court* to *examine* said report and if it *conforms* to the *law* to *confirm*, unless exceptions are filed, in which event the court shall empanel a jury to try the issues of fact made by exceptions. Upon a verdict being rendered if sufficient *cause* be not shown for setting it aside the *court to render judgment* and *make such orders as may be necessary*, either party to

have the right of appeal to Circuit Court, and pending appeal the railroad company to take the land upon payment for same.

It seems that this proceeding in every respect may be regarded as one in which a judicial question was pending before a State Court authorized to exercise judicial functions therein.

The State of Kentucky has delegated the right of eminent domain upon certain conditions precedent. The corporation seeking to exercise it must be *such a one as is authorized to construct a railroad.* It must *be unable to contract*, and the property sought to be condemned must be *necessary.* This certainly opens a judicial inquiry both of law and fact. (Sec. 835.)

Parties are *summoned to show cause.* (Sec. 837.)

It shall be the *duty* of the *court* to *examine* report and *pass* upon the question whether or not it *conforms to law.* If sufficient *cause* be not shown to *set aside verdict*, the court shall *render judgment* and *make such orders as may be necessary.*

If the right of removal is denied, the County Court can pass upon all these questions and may allow a corporation not authorized by law to exercise right of eminent domain to take and do damage of largely more than the value of two thousand dollars to the property of a non-resident of the State of Kentucky.

We insist that it is immaterial in this action whether or not the original action or proceeding was properly removed to the Federal Court as the question of jurisdiction certified by Judge Evans to this court is: "Did the court have jurisdiction to grant the

injunction in *this* action?" Questions of removal and jurisdiction in original proceeding must be decided in due and orderly course of legal procedure *in the Federal Court* in the action in which those questions are or should be directly raised, and if the court goes wrong in deciding them, (from plaintiff view point) then the plaintiff Traction Company can appeal that action.

And it must try these questions in the proceeding in which they arise in their order, in due decorum, and not proceed in defiance of all law in the County Court to wrest the Mining Company's land from its possession and ownership, as it acknowledges and admits, as we charge in our bill, that it attempted to do, and as it would have done but for the injunction herein.

The only proper question in *this* action is "Did the Federal Court have jurisdiction notwithstanding section 720 to restrain the proceedings in the County Court attempted to be had after the original cause had been actually removed to and was pending in the Circuit Court in order to protect it jurisdiction in the removed cause?" If it did not have this power of protecting itself and its jurisdiction, then as a court so far as removed causes are concerned it is a nonentity whose orders command no respect on any hand and the law of removal of causes is ineffectual and unenforceable in any case when the State Court can be led by litigants to disregard it. Surely the authors of section 720 could have intended no such result, and indeed the courts have so held, finding many exceptions from its comprehensive language.

Submitting this to the court we join our learned and ingenious brothers on the other side in discussing

the question of jurisdiction in original action or proceeding. He says our County Court is almost "purely administrative" in its jurisdiction—is an "administrative court" in effect no court but a mere "functionary". —We maintain that if the Traction Company purporting to be an agent of the state can take land from the possession and ownership of the citizen by an *ex parte* proceeding in a non-judicial tribunal, "an administrative court" without notice or summons, on its own unsworn representation that it is the chosen agent of the state, without tendering the citizen a day in court on the question of authority to take, then in that view of the law, which is the one adopted in brief on the other side, such a taking would be and constitute such a deprevation of the property of the citizen without due process of law contrary to the guaranty of the Federal Constitution, as well as the state. Such a taking is just what he says in his brief is contemplated by our Statute.

Go with him further in his argument that the County Court is "an administrative court" and a court only in name and you come to an absurdity. What court—for some court must,—will pass on the jurisdictional facts in case of controversy? Not the County Court for its jurisdiction is administrative, and also because no controversy can there arise as summons is not served on defendent until after the "Legislative Machinery" has been placed in motion, and he is summoned to be heard on the question of amount of damages. Not the Circuit Court, for counsel says it can try no controversy except that as to amount of damages. Where does this leave us? The

allegations of the bill are true and must be accepted as true, as there is no denial by the Traction Company.

The Traction Company's application to the County Court for the appointment of commissioners "was not based on facts and was not brought in good faith". The statements in the application being false, the Traction Company does not possess the power to condemn; yet by his contention this is a trifle. Notwithstanding it does not possess this essential power under the laws of Kentucky, persons calling themselves a Traction Company, not being properly created organized as a railroad corporation, without having attempted to agree with the citizen in a price for his land and without complying with any of the conditions imposed by statute, can come in our County Court, file a false application, not even sworn to, have that "administrative court" "functionary" appoint commissioners, receive their report, summon the citizen to be heard on that report, on the question of amount of damages, render judgment and forthwith take his land, irrevocably, without a judicial hearing.

Surely such was not the intention of any Legislature. The proceeding provided for by the statute while summary was intended to be brought and tried in the County Court as a court, just as a will contest might be or any other case in court, and all questions of law and facts tried out; that court must pass on the question as to whether or not the plaintiff or claimant of such power as an agent of the state is actually such agent and has complied with all necessary conditions attached to the exercise of the power and

had the power delegated to it by the state. This makes a "civil action" a "controversy of a civil nature", nothing more nor less.

And under the elastic federal procedure, which is supposed to conform as nearly as possible to state procedure in the state where the particular Federal Court sits, the proceeding may be begun in that court, and there prosecuted to judgment, provided the citizenship of the parties authorized it.

The point we make is this: The question involved on removal does not touch on the right of the state or its agent to condemn, upon a compliance with the conditions and terms fixed by the state for the exercise of that power, but courts, federal or state, may alike pass on the questions as to whether or not the power is possessed by *a particular agent.* We do not in this case question the existence of the power but we say that so far as the question at issue is concerned, The Madisonville Traction Company is not an agent of the Commonwealth of Kentucky, and does not possess the power of eminent domain, and this court may so find in the discharge of its judicial duty without infringing on the sovereignty of Kentucky in any degree. Nor does the question of expediency of the removal as raised on page twenty-one of brief alter the case. Legal rights must be tried out, and no injustice done to anyone because the railroad company is in a hurry.

We respectfully ask that the decree be sustained; or if that cannot be done that the bill be not dismissed; but the court below be instructed to continue force the injuction *pendente lite* until the Traction case is finally disposed of.

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C. J. WADDILL,
of Counsel.

Supreme Court of the United States.

No. 362.—October Term, 1904.

The Madisonville Traction Company, Appellant, *vs.* The Saint Bernard Mining Company. } Appeal from the Circuit Court of the United States for the Western District of Kentucky.

[January 16th 1905.]

Mr. Justice Harlan delivered the opinion of the Court.

The Madisonville Traction Company, a Kentucky corporation, having by its charter authority to construct an electric railroad, filed its application in the County Court of Hopkins County, in that Commonwealth, to condemn for its use certain lands belonging to the Saint Bernard Mining Company, a Delaware corporation engaged in mining coal—the Traction Company being styled in the application as plaintiff and the Mining Company as defendant.

The application was made under the Kentucky Statutes relating to the condemnation of lands. The nature of those proceedings, whether judicial or not, appears from certain provisions of those statutes which may be summarized as follows:

Any company authorized to construct a railroad, if "unable to contract with the owner of any land or material *necessary for its use* for the purpose thereof," may file in the office of the clerk of the County Court a description of such land or material, and have commissioners appointed to assess the damages which the owner is entitled to receive. *Ky. Stat.* § 835.

The commissioners are required to make their award of damages in writing, giving the names of the owners, and whether non-residents of the State, infants, of unsound mind, or married women. *Ib.* § 836.

It is made the duty of the clerk of the court, upon application of the company, to issue process against the owners to show cause why the report should not be confirmed, and make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court. *Ib.* § 837.

At the first regular term, "after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required," the court must examine the report and pass upon it. *Ib.* § 838.

If exceptions are filed by either party, a jury must be empaneled to try the issues of fact, and judgment rendered in conformity to the verdict, if sufficient cause to the contrary be not shown. Either party may appeal to the Circuit Court, the appeal to be tried *de novo*.

Upon the confirmation of the report of the commissioners or the assessment of damages by the court, as provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the court when the damages are assessed by it, and all costs adjudged to the owner, the railroad company becomes entitled to take possession of the land and material, and to use the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal is taken from the judgment of the County Court by the company it is not be entitled to take possession of the land or material condemned until it pays into court the damages assessed and all costs. *Ib.* § 839.

The commissioners appointed by the county court, in the above proceeding, awarded $100 as damages to be paid to the Mining Company.

Process having issued, the Mining Company, before any action was taken upon the report, filed its petition and bond for the removal of the case into the Circuit Court of the United States, alleging, among other things, that the value of the matter in dispute, exclusive of interest and costs, exceeded $2,000. The petition for removal distinctly alleged, as the ground of removal, that the two companies were corporations of different States.

The sufficiency of the bond was not disputed. But the County Court refused to recognize any right of removal, and the Kentucky corporation was about to proceed in the prosecution of its case in that court, despite the application for removal. Thereupon the Delaware corporation filed in the Circuit Court of the United States a complete transcript of the proceedings in the State court.

Subsequently the present original suit in equity was instituted in the Federal court by the Mining Company against the Traction Company. The bill, repeating the allegations in the petition for removal as to the diverse citizenship of the two corporations, showed that, notwithstanding what had been done to have the cause removed, from the State court, the Traction Company was about to proceed to have the lands condemned in the case instituted in the County Court. Among other things the bill alleged that plaintiff denied the right of the Traction Company to have the lands in question condemned, and averred that the report of the commissioners was insufficient in law; that the commissioners acted improperly, unfairly and unfaithfully in their viewing of the land, in the preparation of their report and in awarding damages; that $100 was wholly inadequate as compensation, and was assessed and given under the influence of passion

and prejudice, or some other illegal motive; that the land sought to be taken was worth, intrinsically, a great deal more than that amount; that the incidental damages done to the property of plaintiff in the construction of the road, (which damages under the laws of Kentucky the said commissioners should have taken into consideration and assessed, but did not, § 836,) exceeded $2,000; that the plaintiff's property and business will not be benefited in the least degree by the construction or prudent operation of the railroad; and that "it is proposed to deprive it of over nine acres of its land, which through its location is valued at and is worth over $2,500, and is so situated that such deprivation will irreparably injure and damage its remaining land."

The relief asked in the present suit was that the Traction Company be restrained and enjoined from further prosecuting the case in the County Court or taking any further steps therein.

The Traction Company demurred to the bill, one of the grounds of demurrer being that the Circuit Court was without jurisdiction or authority, under the Constitution and laws of the United States, to grant the injunction asked for, or any other relief. The Circuit Court sustained its jurisdiction and overruled the demurrer. The Traction Company stood by its demurrer, and a final decree was entered enjoining that company from any further prosecution of the case in the County Court.

It has been observed that the parties to the proceeding in the County Court are corporations, and therefore each is to be deemed, for the purpose of suing and being sued in the Federal court, a citizen of the State by whose laws it was created. The questions presented by the record are these: Was the proceeding in the State court a suit or controversy to which the judicial power of the United States extends? If a suit or controversy, was it removable to the Circuit Court of the United States? If removable, was it, in law, removed, and was it competent for that court, after the removal of the case, to enjoin the Traction Company from further proceeding in the State court?

We recognize the importance of these questions, and have given them the fullest consideration.

Certain principles, relating to the removal of cases, have been settled by former adjudications. They are:

1. If a case be a removable one, that is, if the suit, in its nature, be one of which the Circuit Court could rightfully take jurisdiction, then upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the State court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void. *Railroad Company* v. *Mississippi*, 102 *U. S.* 135, 141; *Railroad* v. *Kontz*, 104 *U. S.* 5, 14; *Steamship Company* v. *Tugman*, 106 *U. S.* 118, 122; *St. Paul & Chicago R. R. Co.* v. *McLean*, 108 *U. S.* 212,

216; *Crehore* v. *Ohio &c. Railway Co.*, 131 *U. S.* 240, 243; *Kern* v. *Huidekoper*, 103 *U. S.* 485, 493.

2. After the presentation of a sufficient petition and bond to the State court in a removable case, it is competent for the Circuit Court, by a proceeding ancillary in its nature—without violating section 720 of the Revised Statutes forbidding a court of the United States from enjoining proceedings in a State court—to restrain the *party* against whom a cause has been legally removed from taking further steps in the State court. *French, Trustee*, v. *Hay*, 22 *Wall.* 252; *Dietzsch* v. *Huidekoper*, 103 *U. S.* 494, 496–7; *Moran* v. *Sturgess*, 154 *U. S.* 256, 270. See also, *Sargent* v. *Holton*, 115 *U. S.* 352; *Harkraker* v. *Wadley*, 172 *U. S.* 165; *Gates* v. *Bucki*, 53 *Fed. Rep.* 969; *Texas & Pacific Ry. Co.* v. *Kuteman*, 54 *Fed. Rep.* 551; *In* 96 *Whitelaw*, 71 *Fed. Rep.* 733, 738; *Iron Mountain R. R. Co.* v. *Memphis, re Fed. Rep.* 131; *James* v. *Central Trust Co.*, 98 *Fed. Rep.* 493.

3. It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the State court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. *Stone* v. *South Carolina*, 117 *U. S.* 430, 432; *Carson* v. *Hyatt*, 118 *U. S.* 279, 281; *Marshall* v. *Holmes*, 141 *U. S.* 589, 595; *Burlington &c. Railway Co.* v. *Dunn*, 122 *U. S.* 513, 515.

So that the fundamental question here is whether the case, brought in the County Court, was a removable one. If it was, then the decree of the Circuit Court, restraining the Traction Company from taking further steps in the local court, after the removal of the case to the Federal Court, was right; but if the case was not a removable one, then the decree was erroneous.

The rule is now settled that, under the Judiciary Act of 1887–8, a suit cannot be removed from a State court, unless it could have been brought originally in the Circuit Court of the United States. *Tennessee* v. *Union & Planters' Bank*, 152 *U. S.* 454; *Mexican Nat. R. R.* v. *Davidson*, 157 *U. S.* 201; *Metcalf* v. *Watertown*, 128 *U. S.* 586; *Minnesota* v. *Northern Securities Co.*, 194 *U. S.* 48.

Why could not the proceeding instituted in the County Court have been brought originally in the Federal court? The case, as made in the County Court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different States; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the Circuit Court. It was therefore a proceeding embraced by the very words of the Constitution of the United States which declares that the "judicial power shall extend . . to controversies . . between citizens of different States," as well as by the act of 1887 (§ 1), which declares "that the Circuit Courts of the United States shall have

original cognizance, concurrent with the courts of the several States, of *all* suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, . . in which there shall be a controversy between citizens of different States?" In view of these explicit provisions it is clear that the proceeding in the County Court was a suit or controversy within the meaning both of the Constitution and of the Judiciary Act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so.

Referring to the clause of the Constitution defining the judicial power of the United States Chief Justice Marshall, speaking for the court in *Osborn* v. *Bank of the United States*, 9 *Wheat.* 738, 819, said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

In *Kohl &c.* v. *United States*, 91 *U. S.* 367, 376, which was a suit in the Circuit Court of the United States to condemn lands for a public building, this court, speaking by Mr. Justice Strong, said: "It is difficult then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statutes, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

Two cases very much in point are *Boom Co.* v. *Patterson*, 98 *U. S.* 403, and *Searl* v. *School District No. 2*, 124 *U. S.* 197.

Boom Co. v. *Patterson* was a case of condemnation under a statute authorizing a County District Court to appoint commissioners to appraise the value of the property to be taken. The local statute provided that if the appraisement was not satisfactory, the matter could be brought before the court, where the issues of fact would be tried by a jury, unless a jury was waived. It was a case of diverse citizenship, and, upon the petition of the defendant, a citizen of another State, it was removed from the inferior local court to the Circuit Court of the United States. One question was whether the case was, in its nature, excluded from the jurisdiction of the Federal court. Referring to the contention that the proceeding to take private property for public use was an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, had no right to interfere by any of its departments, this court, speaking by Mr. Justice Field, said: "But

notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding *before the courts* between parties—the owners of the land on the one side and the company seeking the appropriation on the other—there is *a controversy which is subject to the ordinary incidents of a civil suit*, and its determination derogates in no respect from the sovereignty of the State. Again in the same case: "It has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it was created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. *Paul* v. *Virginia*, 8 *Wall.* 177. And in *Gaines* v. *Fuentes* 92 *U. S.* 20, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy."

Searl v. *School District No. 2* was also a proceeding for the condemnation of private property to public use for school purposes. It was commenced by petition filed in a County Court, a subordinate tribunal of one of the counties of Colorado. The local statute authorized the compensation to be fixed by a jury of six freeholders, with a right of appeal. The question in the case was as to the removability of the case from the County Court to the Federal Court. This court, speaking by Mr. Justice Matthews, said: "Such a proceeding, according to the decision of this court in *Kohl* v. *United States*, 91 *U. S.* 367, is a suit at law within the meaning of the Constitution of the United States and the acts of Congress conferring jurisdiction upon the courts of the United States." After referring to prior cases, including *Boom Co.* v. *Patterson*, the opinion proceeds: "The fact that the Colorado statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding *from its commencement* any the less *a suit* at law within the meaning of the Constitution and acts of Congress and the previous decisions of the court. . . It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant." 124 *U. S.* 199.

It will be observed from an examination of the Searles case that this court cited with approval *Colorado Midland Railway Co.* v. *Jones*, 29 *Fed. Rep.* 193, and the *Mineral Range Railroad Co.* v. *Detroit & Lake Superior Copper Co.*, 25 *Fed. Rep.* 515. Those cases fully sustain the proposition that the case brought in the State court was a suit within the meaning of the Constitution and the Judiciary Act.

In the first one named, which was a proceeding under a local statute in an inferior State tribunal for the condemnation of lands for the use of a railway company, Mr. Justice Brewer, then Circuit Judge, after referring to the local statute under which the company proceeded and to *Boom Co.* v. *Patterson*, and *Searl* v. *School District*, held the case to be removable, although the proceedings for condemnation were somewhat different from those in an ordinary trial, saying: "I do not suppose that a State can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a common-law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two States, could not be removed to the Federal courts. If this were possible, then the only thing the legislature of a State would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."

In *Mineral Range R. Co.* v. *Detroit & Lake Superior Copper Co.*, Mr. Justice Brown, then District Judge, after referring to *Boom Co.* v. *Patterson*, and many other adjudged cases, said: "But conceding that if the only question in this case were the amount of damages to be paid by the railroad company, the jurisdiction of this court would be sustained by the authorities above cited, it is insisted that these cases are inapplicable, because by the statute of this State the jury or commissioners must pass upon the question of the necessity for taking the property, as well as the amount of damages to be awarded. But we think that in this particular counsel overlook the distinction between the *power* to condemn, which confessedly resides in the State, and *proceedings* to condemn, which the State has delegated to its *courts*. The proceeding is certainly not deprived of its character as a suit by reason of its taking cognizance of this additional question; and *if it be a suit*, the right of removal attaches. Whenever a right is given by the law of a State, and the courts of such State are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist." 25 *Fed. Rep.* 520.

In the more recent case of *Smith* v. *Adams*, 130 *U. S.* 167, 173, Mr. Justice Field, speaking for the court and referring to the clauses of the

Constitution and the statutes relating to the judicial power and the courts of the United States, said: "By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy."

It may be here said that the provisions of the local statutes of condemnation, referred to in the above cases, are substantially the same as those in the Kentucky Statutes.

We cannot doubt, in view of the authorities, that the case presented in the County Court was a "suit" or "controversy between citizens of different States," within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its constitution, (*Const. Ky.* § 140); and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record. *Fletcher* v. *Light*, 4 *Bush.* 303; *Pennington* v. *Wolfolk*, 79 *Ky.* 13.

Are the above cases inapplicable by reason of their having been decided prior to the passage of the Judiciary Act of 1887–8 limiting the right of removal to suits of which the Circuit Courts of the United States could take original cognizance? Clearly not. The difference between that act and the act of 1875 is wholly apart from the present discussion; for, both acts gave the Circuit Courts *original* jurisdiction of *all* suits, having the requisite amount in dispute, and in which there was a controversy between citizens of different States. So that what was a suit or controversy to which, by reason of diverse citizenship, the judicial power of the United States extended under the act of 1875, must be deemed a suit under the act of 1887–8. The only effect of the latter act, so far as the present question is concerned, was to restrict the right of removal from the State court to cases of which the Circuit Court could take original cognizance. And the present case, being a suit involving a controversy between citizens of different States, is manifestly of that character.

It is said, however, that when it is proposed to take private property for public purposes, the question of appropriation is one primarily and exclusively for the State to determine.

There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or State, except for purposes which are of a public character, although such taking be ac-

companied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments. *Loan Asso.* v. *Topeka*, 20 *Wall.* 655; *Cole* v. *LaGrange*, 113 *U. S.* 1, 6. If the purpose be public the taking may be outright, provided reasonable, certain and adequate provision is made, at the time of appropriation, to ascertain and secure the compensation to be made to the owner. *Cherokee Nation* v. *Kansas Railway Co.*, 135 *U. S.* 641, 659; *Sweet* v. *Rechel*, 159 *U. S.* 380, 399; *Western Union Tel. Co.* v. *Pennsylvania R. R. Co., the present term.* Any State enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment. *C., B. & Q. R. R. Co.* v. *Chicago*, 166 *U. S.* 226; *San Diego &c.* v. *National City*, 174 *U. S.* 739, 754; *Smyth* v. *Ames*, 169 *U. S.* 466, 525. The position taken by the highest court of Kentucky on this general subject appears from *Tracy &c.* v. *Elizabethtown &c. R. R. Co.*, 80 *Ky.* 259, 269. It was there said: "It is erroneous to suppose that the Legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property. For if the use be not public, or no necessity for the taking exists, the Legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

Speaking generally, it is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States. "A State cannot," this court has said, "tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts." *Reagan* v. *Farmers' Loan & Trust Co.*, 154 *U. S.* 362, 391.

Now, it is true that the Circuit Court could not have the property in question condemned for local public purposes, if the State had not previously, by statute, authorized its condemnation. After the removal of a case of condemnation from a State court the Federal court would proceed under the sanction of State legislation. It would enforce the State law, unless that law authorized the appropriation of private property for purposes that were not really of a public nature. So far as authority to take the property for local public purposes was concerned, the Circuit Court could not enforce any other than the State law. It would respect the sovereign

power of the State to define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But at the same time it could enforce, as of course it must, the authority of the Supreme Law of the Land, which expressly extends the judicial power of the United States to all suits involving controversies between citizens of different States, and which also, by statute, gives the Circuit Courts of the United States, without qualification, jurisdiction of such controversies. A State cannot by any statutory provisions withdraw from the cognizance of the Federal courts a suit or judicial proceeding in which there is such a controversy. Otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different States would thereby be defeated. If the judiciary act of Congress admitted of the case in the County Court being brought within the original cognizance of the Circuit Court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the State. Under any other view a State, by its own tribunals, could deprive citizens of other States of their property by condemnation, without giving them an opportunity to protect themselves, in a national court, against local prejudice and influence.

It may, however, be urged that the Delaware corporation can be fully protected by the State court in its rights of property, because, if any Federal right be denied it, the authority of this court can be invoked upon writ of error to the highest court of the State. But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from the State court. Such questions would not ordinarily involve a Federal right. In the present case the commissioners reported the damages to be only $100; whereas, the owner alleges that the amount awarded was grossly inadequate, practically confiscatory. That question, as well as the question whether the statute authorized the Traction Company to take the property, the Delaware corporation is constitutionally entitled, as between it and the Kentucky corporation, by reason of the diverse citizenship of the parties, to have determined upon their merits in a court of the United States, in which, presumably, it will be protected against local prejudice or influence. The Circuit Court, recognizing the right of the Traction Company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Kentucky statute, and meet fully the ends of justice. Besides, a court always looks to substance and not to mere forms. Mere forms are not of vital consequence in cases of condemnation. *Kohl* v. *United States*, 91 *U. S.* 367, 375; *United States* v. *Jones*, 109 *U. S.* 514, 519.

It is suggested that the State Legislature might have consummated the taking of the property of the Delaware corporation by means of a non-judicial tribunal, and thus left open simply the question of compensation to the owner of the property taken. We do not perceive that this suggestion is at all material in the present discussion; for, the State has chosen to provide for the taking by means of what is conceded to be a suit in one of its judicial tribunals. It is, in effect, conceded that the Circuit Court may be given jurisdiction of the question of compensation. But the contention is, that in no case can the judicial power of the United States be invoked until the question of taking is consummated by a proceeding in the particular local tribunal designated by the State. This view, it is supposed, finds support in the cases in which it has been held that an original suit directly against a State, or a suit against an officer of the State which, by reason of the particular relief sought, is in effect a suit against the State, may be limited by the State to suits brought in one of its own courts. *Smith* v. *Reeves*, 178 *U. S.* 436. This illustration is wide of the mark; for, the mandate of the Constitution of the United States (11th Amendment) is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state;" whereas, the judicial power of the United States and the original jurisdiction of the Circuit Courts, whatever may be ordained by State legislation, extends to suits in which there is a controversy between citizens of different States. The exercise by the Circuit Courts of the United States of the jurisdiction thus conferred upon them is pursuant to the Supreme Law of the Land, and will not, in any proper sense, entrench upon the dignity, authority or autonomy of the States; for each State, by accepting the Constitution, has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them. In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the State courts must take care, not to infringe any right secured by the Constitution and the laws of the United States. It should, however, be remarked that there is nothing in the Kentucky statute which indicates any purpose on the part of the Legislature of that Commonwealth to fly in the face of the above cases or to evade the principles announced in them. It is not to be implied from the statute in question that the State intended to exclude or supposed that it could exclude from the Federal courts jurisdiction of any suit to which the judicial power of the United States extended.

It was said that if the case was a removable one the time for removal was after it was taken by appeal to the State Circuit Court, where it could be tried *de novo*. There is nothing in the act of 1887–8 which sustains this view. Was the case, as it was in the County Court, a suit in which there was a controversy between corporations of different States? If so, the right of removal was perfect under the act of 1887–8. Under the Kentucky statute the condemning party was entitled, even after appeal to the Circuit Court, to pay into court the damages assessed in the County Court, and before the case was concluded in the Circuit Court to take possession of the land and oust the owner. *Ky. Stat.* § 839; 80 *Ky.* 259, 269. Clearly, the owner was not bound to wait until the proceedings in the County Court were concluded, or until he was put out of possession before exercising his right of removal, if the case was a removable one.

We hold that as the proceeding in the County Court was a suit involving a controversy between corporate citizens of different States, it was one of which the Circuit Court of the United States could have taken original cognizance, under the Judiciary Act, and it was, therefore, a removable case. And being a removable case, it is to be regarded as having been removed upon the filing of the petition and accompanying bond for removal; in which event, it was competent for the Circuit Court, having thus acquired jurisdiction of the subject matter, and of the parties, to enjoin the Traction Company from proceeding further in the State court.

For the reasons stated, the decree of the Circuit Court awarding the injunction must be affirmed.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 362.—October Term, 1904.

The Madisonville Traction Company, Appellant, vs. The Saint Bernard Mining Company. } Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the decision of the Court. The question on which I differ is whether a proceeding for the taking of land by eminent domain, authorized by the State of Kentucky to be begun in the Courts of Kentucky, can be begun in the Circuit Court of the United States, whenever one of the parties is a citizen of another State. Of course, I am speaking of the proceeding for the taking of the land, not of that for compensation, to which I shall refer later. The argument which does not command my assent, stated in a few words, is that such a proceeding in such a case is a controversy between citizens of different States, and therefore by the very words of the Constitution must be within the jurisdiction of the United States Courts. It seems to me that this is rather too literal a reading, and, on the whole, is a sacrifice of substance to form.

The fundamental fact is that eminent domain is a prerogative of the State, which on the one hand may be exercised in any way that the State thinks fit, and on the other may not be exercised except by an authority which the State confers. The taking may be direct, by an act of the Legislature. It may be delegated to a railroad company, with a certain latitude of choice with regard to the land to be appropriated. It may be delegated subject to the approval of a legislative committee or of a board other than a court. When the State makes use of a court, instead, for instance, of a railroad commission, the character of the proceeding is not changed. The matter still is wholly within its sovereign control. The State may intervene after the proceedings have been begun, and take the land. It may direct the entry of a decree of condemnation. An illustration of its continuing power may be seen in *In re Northampton*, 158 Mass. 299. The matter of grade crossings had been referred by the Legislature of Massachusetts to the courts, and a petition was pending for the abolition of certain grade crossings in Northampton. The case had been sent to commissioners, and they had reported. Pending a motion to confirm their report

the Legislature passed an act forbidding a change in that case without the consent of the city council. It was held that, as the whole subject was originally within the control of the Legislature, it did not cease to be so by being referred to the courts, and the act was sustained.

A further illustration, and one in which substance has prevailed over form, is to be found in the case of suits by citizens of another State against officers of a State. In form such suits are controversies between citizens of different States and within the jurisdiction of the United States Courts. But if, in substance, they have the effect of suits against a State, the jurisdiction is denied. And the decisions do not stop there, but when the State has waived its immunity, as it may, and has given permission to a suit against the officer in a State court, it still is held that, although there is a controversy between citizens of different States which thus has become subject to litigation, that litigation must be confined to the courts which the State has named. Yet there is no doubt that, with the State's consent, its officers, or the State itself, could be sued in the Courts of the United States. *Smith* v. *Reeves*, 178 U. S. 436. *Chandler* v. *Dix*, 194 U. S. 590.

It seems to me that, if a State authorizes a taking to be accomplished by certain machinery, the United States has no constitutional right to intervene and to substitute other machinery because the State has chosen to use its law courts rather than a legislative committee and thus to give to the exercise of its sovereign power the external form of a suit at law. It seems to me plain that the exercise of that power depends wholly on the State, may be limited as the State chooses, and cannot be carried further than the State has authorized in terms. Suppose that a proceeding for taking land is removed to the United States Court contrary to the legislation of the State, by whose authority, I ask myself, is a subsequent taking to be decreed? It is open to any one who can think it to say that the attempt to use the State Courts to the exclusion of the United States Courts makes the taking void, but I cannot understand how a taking unauthorized by the State can be good. If I am right in supposing that the State has an absolute right to limit the exercise of eminent domain as it sees fit, then, so far as the construction of the Kentucky statute is concerned, I need only invoke the cases last cited, to show that the statute imports that the State meant to confine the proceedings to its own courts. Certainly it does not purport to authorize them elsewhere, and that is enough. *Smith* v. *Reeves*, 178 U. S. 436, 445. *Chandler* v. *Dix*, 194 U. S. 590, 592. The difference between myself and the majority is not merely on the construction of the Kentucky statutes. If that were all I should not express my dissent. But the difference as to construction is a consequence and incident of a difference on the far more important question of power.

Of course, what I have said is without prejudice to the possibility that in case a question of rights under the Constitution of the United States should arise and be carried to the highest court of the State, it might be brought here by writ of error, as was said by Mr. Justice Harlan in *Smith* v. *Reeves*. I do not go into that, as it is immaterial now.

It is said that the question which I am discussing has been settled by the adjudications of this court. I do not think so. The only cases that have any bearing are *Boom Co.* v. *Patterson*, 98 U. S. 403, and *Searl* v. *School District No. 2*, 124 U. S. 197. In the former of these cases Mr. Justice Field states in the most explicit way that at the stage the case had reached when it was removed from the State court the compensation to be paid the owner of the land was the only question open. I have no criticism to make on that case. It seems to me to favor my views throughout. I think it very possible that after the title to property has been taken, if the question of compensation still is unsettled, that may be a controversy within the meaning of the Constitution. The sovereign power of the State is at an end, and the former owner has a right under the Fourteenth Amendment of the Constitution of the United States to get his pay.

Boom v. *Patterson* was followed by *Searl* v. *School District No. 2*, seemingly without noticing the distinction that in the latter case the property had not yet been appropriated. There was no serious reasoning in the case, and I should think it a most inadequate justification for trenching upon the powers of the States, even if it were strictly in point. It arose, however, under the former statute as to removals, which did not limit them to cases which could have been begun in the United States Courts. Whether I should think that a sufficient distinction if that case were before me now I shall not consider—but I feel warranted in believing that no one who took part in that decision imagined that he was establishing the doctrine now laid down or any principle broad enough to cover the present case. I cannot think that even Mr. Justice Matthews would have denied that the day after removal the State could have withdrawn the power to condemn the land and left the Court in the air, or could have condemned the land pending the proceedings without paying them the slightest regard. If the State did retain those powers, I think it no less retained the *delectus personarum* and the right to confine its authority, while it left it outstanding, to the persons of its choice.

I wish to add only that I am not aware of any limitations in the Constitution of the United States upon a State's power to condemn land within its borders, except the requirements as to compensation. All that was decided in *Loan Association* v. *Topeka*, 20 Wall. 655, and *Cole* v. *La Grange*, 113 U. S. 1, was that the Constitutions of certain States did not

authorize the taking of private property for a private use. But if those decisions had been rested on the Fourteenth Amendment, which they were not, and in my opinion could not have been, I do not perceive that they have any bearing upon what I have said or upon the case at bar.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice BREWER and Mr. Justice PECKHAM concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.